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# Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session

## 19 June-7 July 2006

General Assembly
Official Records
Sixty-first session
Supplement No. 17 (A/61/17)

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*Note*

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# I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the thirty-ninth session of the Commission, held in New York from 19 June to 7 July 2006.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, the report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

# II. Organization of the session

## A. Opening of the session

3. The thirty-ninth session of the Commission was opened on 19 June 2006.

## B. Membership and attendance

4. The General Assembly, in its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. By its resolution 57/20 of 19 November 2002, the General Assembly further increased the membership of the Commission from 36 States to 60 States. The current members of the Commission, elected on 16 October 2000 and 17 November 2003, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated:[1] Algeria (2010), Argentina (2007), Australia (2010), Austria (2010), Belarus (2010), Belgium (2007), Benin (2007), Brazil (2007), Cameroon (2007), Canada (2007), Chile (2007), China (2007), Colombia (2010), Croatia (2007), Czech Republic (2010), Ecuador (2010), Fiji (2010), France (2007), Gabon (2010), Germany (2007), Guatemala (2010), India (2010), Iran (Islamic Republic of) (2010), Israel (2010), Italy (2010), Japan (2007), Jordan (2007), Kenya (2010), Lebanon (2010), Lithuania (2007), Madagascar (2010), Mexico (2007), Mongolia (2010), Morocco (2007), Nigeria (2010), Pakistan (2010), Paraguay (2010), Poland (2010), Qatar (2007), Republic of Korea (2007), Russian Federation (2007), Rwanda (2007), Serbia (2010), Sierra Leone (2007), Singapore (2007), South Africa (2007), Spain (2010), Sri Lanka (2007), Sweden (2007), Switzerland (2010), Thailand (2010), the former Yugoslav Republic of Macedonia (2007), Tunisia (2007), Turkey (2007), Uganda (2010), United Kingdom of Great Britain and Northern Ireland (2007), United States of America (2010), Uruguay (2007), Venezuela (Bolivarian Republic of) (2010) and Zimbabwe (2010).

5. With the exception of Ecuador, Fiji, Israel, Jordan, Lebanon, Mongolia, Rwanda, the former Yugoslav Republic of Macedonia, Tunisia, Uruguay and Zimbabwe, all the members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Angola, Bangladesh, Bolivia, Bulgaria, Cape Verde, Côte d'Ivoire, Cuba, Egypt,

El Salvador, Finland, Guinea, Holy See, Kuwait, Latvia, Lesotho, New Zealand, Panama, Philippines, Romania, Senegal, Slovenia, Syrian Arab Republic, Tonga, Ukraine and Viet Nam.

7. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: World Bank, and United Nations Economic Commission for Europe;

(b) *Intergovernmental organizations*: Asian-African Legal Consultative Organization, Banque des États de l'Afrique centrale, European Community, International Cotton Advisory Committee and International Institute for the Unification of Private Law;

(c) *Non-governmental organizations invited by the Commission*: American Arbitration Association, American Bar Association, Centro de Estudios de Derecho, Economía y Política, Commercial Finance Association, European Law Students Association, Federación Latinoamericana de Bancos, INSOL International, International Bar Association, International Chamber of Commerce, International Council for Commercial Arbitration, International Insolvency Institute, International Women's Insolvency and Restructuring Confederation, Kuala Lumpur Regional Centre for Arbitration, London Court of International Arbitration, Moot Alumni Association, Association of the Bar of the City of New York, Regional Centre for International Commercial Arbitration (Lagos), School of International Arbitration, Swiss Arbitration Association and Union internationale des avocats.

8. The Commission welcomed the participation of international non-governmental organizations with expertise in the major items on the agenda. Their participation was crucial for the quality of texts formulated by the Commission and the Commission requested the Secretariat to continue to invite such organizations to its sessions.

## C. Election of officers

9. The Commission elected the following officers:

| | |
|---|---|
| *Chairperson*: | Stephen Karangizi (Uganda) |
| *Vice-Chairpersons*: | Álvaro Sandoval (Colombia)<br>Wisit Wisitsora-At (Thailand)<br>Vesna Živković (Serbia) |
| *Rapporteur*: | Alexander Markus (Switzerland) |

## D. Agenda

10. The agenda of the session, as adopted by the Commission at its 812th meeting, on 19 June, was as follows:

1. Opening of the session.

2. Election of officers.

3. Adoption of the agenda.

4. Preliminary approval of a draft UNCITRAL legislative guide on secured transactions.

5. Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

6. Procurement: progress report of Working Group I.

7. Transport law: progress report of Working Group III.

8. Possible future work in the area of electronic commerce.

9. Possible future work in the area of insolvency law.

10. Possible future work in the area of commercial fraud.

11. Monitoring implementation of the 1958 New York Convention.

12. Technical assistance to law reform.

13. Status and promotion of UNCITRAL legal texts.

14. Coordination and cooperation:

    (a) General;

    (b) Reports of other international organizations.

15. Congress 2007.

16. Willem C. Vis International Commercial Arbitration Moot competition.

17. Relevant General Assembly resolutions.

18. Other business.

19. Date and place of future meetings.

20. Adoption of the report of the Commission.

## E. Establishment of two Committees of the Whole

11. The Commission established two Committees of the Whole (Committee I and Committee II) and referred to them for consideration agenda items 4 and 5 respectively. The Commission elected Kathryn Sabo (Canada) Chairperson of Committee I and José Maria Abascal Zamora (Mexico) Chairperson of Committee II. Committee I met from 19 to 26 June and held 11 meetings. Committee II met from 26 to 28 and on 30 June and held 7 meetings.

### F. Adoption of the report

12. At its 821st meeting, on 23 June 2006, at its 822nd meeting, on 26 June 2006, at its 828th meeting, on 30 June 2006, and at its 834th meeting, on 7 July 2006, the Commission adopted the present report by consensus.

## III. Preliminary approval of a draft UNCITRAL legislative guide on secured transactions

### A. Approval of the substance of the recommendations of the draft UNCITRAL legislative guide on secured transactions

13. The Commission expressed its satisfaction with the progress achieved by Working Group VI (Security Interests) in developing a legislative guide on secured transactions. With a view to approving in principle the substance of the recommendations of the draft guide, the Commission considered the recommendations contained in documents A/CN.9/WG.VI/WP.21/Add.3, A/CN.9/WG.VI/WP.24 and Add.5, A/CN.9/WG.VI/WP.26/Add.4-8 and A/CN.9/611 and Add.1 and 2.

#### 1. Key objectives (A/CN.9/WG.VI/WP.26/Add.7)

14. The Commission approved the substance of the key objectives.

#### 2. Scope of application (A/CN.9/WG.VI/WP.26/Add.7)

15. Broad support was expressed for recommendation 2 (parties, security rights, secured obligations and assets covered). With respect to recommendation 3, the view was expressed that it might not be necessary, as it merely listed examples that would be covered in any case by recommendation 2. It was stated, however, that the non-exhaustive list contained in recommendation 3 was useful in providing guidance to States with respect to a number of important issues, such as, for example, whether the same law should cover both possessory and non-possessory security rights. As to subparagraph (g) of recommendation 3, the Commission noted with appreciation the analysis provided in the note with respect to the appropriateness of a qualified rather than an outright exclusion of security rights in securities, immovable property, aircraft, ships and attachments thereto and agreed to leave that question to Working Group VI. As to subparagraph (h) of recommendation 3, it was generally accepted that some reference might be included to future work on security rights in intellectual property rights in line with the decision of the Commission (see paras. 81-84 and 86 below).

16. With respect to recommendation 4, it was noted that the chapeau should be retained without square brackets and that the substance of subparagraphs (a) (securities) and (b) (immovable property) would depend on whether Working Group VI would decide to adopt a qualified rather than an outright exclusion with respect to security rights in securities and immovable property (see para. 15 above). In particular with respect to directly held securities, the hope was expressed that Working Group VI would not exclude them, as security rights in directly held securities was part of significant financing transactions and directly

held securities were not part of the work of other organizations. As to subparagraphs (c) (wages) and (d) (assets necessary for the livelihood of a person), it was widely felt that they should be reformulated in broader terms by reference to law other than secured transactions law.

17. After discussion, the Commission approved the substance of the recommendations on scope.

### 3. Basic approaches to security (A/CN.9/WG.VI/WP.26/Add.7)

18. The Commission approved the substance of the recommendations on the basic approaches to security that enshrined the comprehensive approach and the functional approach that should be followed in a modern secured transactions law.

### 4. Creation of the security right (effectiveness as between the parties) (A/CN.9/WG.VI/WP.26/Add.7, A/CN.9/WG.VI/WP.26/Add.4 and A/CN.9/611 and Add.1)

19. With respect to subparagraph (d) of recommendation 16 (creation of a security right in a right that secures an assigned receivable, a negotiable instrument or any other obligation), it was stated that neutral terminology should be used that would be suitable for the various legal systems (see A/CN.9/603, para. 23).

20. As to recommendations 33 and 34 (time of creation), it was widely felt that they should be revised to provide that the parties could agree to postpone the time of creation of a security right until after conclusion of the security agreement or dispossession but not that creation could occur at an earlier time. It was also generally thought that those recommendations should be revised to ensure their consistency with recommendation 7 (creation of a security right by agreement).

21. After discussion, the Commission approved the substance of the recommendations on the creation of the security right.

### 5. Effectiveness of the security right against third parties and registration (A/CN.9/WG.VI/WP.26/Add.5, A/CN.9/WG.VI/WP.26/Add.4 and A/CN.9/611 and Add.1)

22. It was widely felt that recommendation 34 bis (meaning of third-party effectiveness) was useful in particular for States that were not familiar with the distinction between creation and third-party effectiveness of a security right.

23. While one delegation reserved its position with respect to recommendation 35 dealing with registration as the general method for achieving third-party effectiveness of a security right, it was widely felt that registration was essential to ensure transparency with respect to security rights.

24. In response to a question, it was noted that dispossession of the grantor was a method for achieving third-party effectiveness only if a security right had been effectively created, a matter that was dealt with in recommendation 7 (creation of a security right by agreement) and the definition of dispossession (see A/CN.9/WG.VI/WP.27/Add.1, para. 21, subpara. (pp)).

25. There was broad support in the Commission for the deletion of recommendation 39 bis (third-party effectiveness of a non-acquisition security right

in low-value consumer goods) on the ground that there were no financing practices that involved security rights in low-value consumer goods. The Commission referred the matter to Working Group VI.

26. With respect to recommendations 41 and 41 bis (third-party effectiveness of security rights in proceeds), it was widely felt that the two alternatives should be referred to Working Group VI with a view to trying, to the extent possible, to reach agreement on one of them.

27. With respect to recommendation 47 bis (functions of registration in the general security rights registry), the concern was expressed that subparagraphs (a) and (b) essentially addressed the same point. However, it was generally felt that they should be retained as separate subparagraphs, since subparagraph (a) dealt with registration as a third-party effectiveness method, while subparagraph (b) dealt with priority as the legal consequence of registration.

28. As to recommendation 47 quater (design principles), the concern was expressed that a registry system such as the one described in the recommendation was not possible. However, it was widely felt that such efficient registry systems were already well functioning not only in developed but also in developing countries and in countries with economies in transition. It was also generally felt that the use of the registry should be inexpensive to registrants and searchers, while the costs of the establishment of the registry system could be recovered over a reasonably long period of time.

29. With respect to subparagraph (c) of recommendation 48 (speedy, cost-efficient and effective registration and searching), the concern was expressed that free access to the registry could inadvertently result in breach of privacy and unauthorized use of information. In order to address that concern, the suggestion was made that a screening process should be introduced requiring searchers to have, give or justify the reasons for the search.

30. However, it was widely felt that such a screening process was not necessary and that, while it could not effectively prevent unauthorized use of the registry, it could inadvertently add costs and delays, a result that would outweigh any benefits. It was stated that free access to the registry was the logical consequence of third-party effectiveness, and priority being based on registration as a security right could not produce legal consequences against parties that had no access to the registry. In addition, it was said that experience with land registries indicated that free access did not necessarily lead to breach of privacy or abuse of information. Moreover, it was pointed out that verification of the identity of the searcher at the time of payment of a search fee was a sufficient deterrent to unauthorized use. Most importantly, it was stated that the fact that the record would contain only a limited amount of data minimized the risk of breach of privacy or abuse, which would, in any case, be addressed by other law.

31. With respect to recommendation 48 bis (security and integrity of the registry), a number of suggestions were made. With respect to subparagraph (c), it was suggested that an option be included for States to permit the issuance (including by electronic means) by the registrar of a certified copy of the notice. As to subparagraph (e), it was suggested that the commentary should clarify the allocation of responsibility between a governmental supervisory authority and a private entity operating the registry. With respect to subparagraph (f), the suggestion was made

that it should be recast to focus on the need for the information on the registry to be capable of reconstitution rather than on how that result could be achieved.

32. In response to a question relating to recommendation 48 ter (liability for loss or damage) on what recourse was available to registering or searching parties for loss or damage caused by an error in the administration or operation of the registration and searching system, it was clarified that the draft guide left it to States to allocate liability based on other law.

33. With respect to recommendation 49 (required content of notice), the concern was expressed that disclosure of the name of the secured creditor, in particular where the secured creditor was a supplier of goods on credit, could make it possible for competitors to find out the list of suppliers of a certain grantor. The concern was also expressed that requiring the inclusion of reference to the maximum amount for which the security right could be enforced in the notice could inadvertently limit the amount of credit available.

34. With respect to recommendations 50 and 51 (sufficiency of grantor name in a notice), it was suggested that, with respect to companies, reference should be made to the name of the company in the company registry. In addition, it was suggested that reference should also be made to the natural persons that were authorized to represent the company. As to whether other identifiers should also be required, it was widely felt that they would not be necessary with respect to corporations, whose name had to be unique to be accepted by the company registry, but would be useful to identify natural persons with the same name.

35. After discussion, the Commission approved the substance of the recommendations on the effectiveness of the security right against third parties and registration.

### 6. Priority of the security right over the rights of competing claimants (A/CN.9/WG.VI/WP.26/Add.6, A/CN.9/WG.VI/WP.26/Add.4 and A/CN.9/611/Add.1)

36. With respect to recommendation 62 ter (priority of security rights in future assets), it was widely felt that it should state more clearly that the rule in recommendation 64 (priority between security rights in the same encumbered assets) applied also to security rights in future assets.

37. In response to a question with respect to subparagraphs (b) and (c) of recommendation 69 (rights of buyers, lessees and licensees of encumbered assets), it was clarified that lessees and licensees took their rights under the lease or license agreement respectively free of the security right. It was widely felt that the recommendation or the commentary should clarify that the security right did not cease to exist, but that the right of the secured creditor to enforce its security right was limited to the lessor's or the licensor's interest.

38. With respect to recommendation 78 (priority of a security right in a right to payment of funds credited to a bank account) and 79 (priority of security rights in money), it was generally felt that the commentary should clarify the meaning of the words "transfer of funds". It was stated that the term "transfer of funds" was intended to cover a variety of transfers, including those by cheque and wire transfer.

39. As to recommendations 82 and 83 (priority of a security or other right in attachments to immovable property), it was stated that an alternative approach might be to require registration of attachments to immovable property only in the general security rights registry and that a note be forwarded from that registry to the immovable property registry. In response, it was observed that that approach was very similar to the one recommended in recommendations 82 and 83; the main difference was said to be that, under the proposed alternative approach, security rights in attachments to immovable property would be registered only in the general security rights registry, while under recommendations 82 and 83 registration could take place in either registry. In that connection, it was pointed out that the particular approach to be followed by each State would depend on the structure of its registry systems.

40. After discussion, the Commission approved the substance of the recommendations on the priority of the security right over the rights of competing claimants.

### 7. Pre-default rights and obligations of the parties (A/CN.9/611 and Add.2)

41. After discussion, the Commission approved the substance of the recommendations on pre-default rights and obligations of the parties.

### 8. Rights and obligations of third-party obligors (A/CN.9/611 and Add.1)

42. In response to a question with respect to subparagraph (b) of recommendation W (rights and obligations of the depositary bank), it was stated that the depositary bank was under no obligation to respond to requests for information by third parties even if its customer (the grantor of a security right) had consented to a release of information. However, it was observed that that result could be achieved by way of an agreement between the grantor and the depositary bank.

43. After discussion, the Commission approved the substance of the recommendations on the rights and obligations of third-party obligors.

### 9. Default and enforcement (A/CN.9/611 and Add.1 and 2)

44. In response to a question with respect to recommendation 89 (general standard of conduct), regarding the difference between the principles of "good faith" and "commercial reasonableness", it was stated that "good faith" was a subjective standard, while "commercial reasonableness" was an objective standard.

45. With respect to recommendation 101 (secured creditor's right to possession of an encumbered asset), it was widely felt that the recommendation should be revised to state clearly that the secured creditor could take possession of the encumbered assets out of court with the prior consent of the grantor given in the security agreement. It was stated that such a recommendation was necessary since in many States the secured creditor was not allowed to take possession of the encumbered assets without applying to a court or other authority.

46. In that connection, it was stated that, while theoretically no further consent would be required, if, at the time the secured creditor attempted to take possession of the encumbered assets, the grantor objected, the secured creditor would have to refer the matter to a court or other authority as a result of the limitations in

recommendations 89 (general standard of conduct), 100 (relief with respect to extrajudicial enforcement) and 101 (secured creditor's right to possession of an encumbered asset) and in particular the reference in recommendation 101 to the use or threat of force or any other illegal act.

47. The suggestion was made that, in the absence of prior explicit consent, subsequent implicit consent or acquiescence should be sufficient, provided that the secured creditor notified the grantor of its intention to pursue extrajudicial repossession with details as to its time and modalities. That suggestion was referred to Working Group VI.

48. With respect to recommendation 106 (enforcement of a security right in proceeds under an independent undertaking), it was suggested that the first sentence be deleted.

49. With respect to recommendations 110 and 110 bis (disposition of encumbered assets), the suggestion was made that they should be recast to provide for court authorization of an extrajudicial disposition of encumbered assets, at least for the purpose of determining default and in view of the impartiality of courts and the need to avoid abuse of rights on the part of secured creditors.

50. That suggestion was objected to. It was stated that recommendations 110 and 110 bis appropriately reflected the principle that the secured creditor could dispose of the encumbered assets out of court if the grantor, after having been notified (recommendation 111), neither came forward to pay (recommendation 99) nor objected to out-of-court disposition of the encumbered assets (recommendation 100). In addition, it was observed that practice indicated that default was a factual issue that was easily determined on the basis of documents. Moreover, it was pointed out that the real question was not whether an encumbered asset would be disposed in or out of court but rather whether any party had an interest in and requested a judicial disposition. In that connection, it was said that all parties had an interest in maximizing the realization value of encumbered assets in order to satisfy the secured obligation and minimize the amount of the outstanding debt. With respect to the concern about abuse of rights on the part of the secured creditor, it was observed that other law could more effectively deal with such instances.

51. With respect to recommendation 111 (advance notice with respect to extrajudicial disposition of encumbered assets), it was suggested that the notice should be optional as it would otherwise place an undue burden on the secured creditor. That suggestion was objected to. It was widely felt that the notice of intention to pursue extrajudicial disposition was an important safeguard to protect the grantor against abusive behaviour on the part of the secured creditor. In addition, it was stated that the recommendation provided an appropriate balance between the need for efficiency and the need to protect the grantor and third parties. In that connection, it was observed that subparagraph (e) of recommendation 111 provided for situations in which the notice did not need to be given and recommendation 112 provided for the notice to be given in an efficient, timely and reliable way.

52. With respect to subparagraph (c) of recommendation 111, it was agreed that the Working Group should clarify and simplify the words in the parenthesis, dealing with the notice of extrajudicial disposition to the grantor.

53. With respect to recommendation 112, the question was raised as to when the notice to the grantor or other parties would be deemed to have been received. In response, it was stated that, while recommendation 112 provided some guidance, the time and place of receipt of a notice was a matter for other law. In that connection, the Commission noted that article 10 of the United Nations Convention on the Use of Electronic Communications in International Contracts[2] (the "Convention on Electronic Contracts") provided guidance with respect to the time and place of dispatch and receipt of electronic communications.

54. With respect to recommendations 113 to 115 (acceptance of encumbered assets in satisfaction of the secured obligation), it was agreed that the recommendations should be revised to make it clear that the grantor could also propose to hand over the encumbered asset to the secured creditor in satisfaction of the secured obligation, provided that the interests of third parties were protected. In that connection, it was stated that giving the asset in payment of the secured obligation was like any other payment and thus would not affect the rights of third parties.

55. The suggestion was also made that encumbered assets could be valued by an independent expert prior to their acceptance by the secured creditor in satisfaction of the secured obligation so that objections that typically arose in the exercise of the remedy could be minimized. It was, however, widely felt that the nature of some assets was such that an accurate valuation could not be made by an expert and the market itself should be left to set the value of the encumbered assets when they were offered for sale.

56. With respect to recommendation 120 (right of prior-ranking secured creditor to take over enforcement), the Commission noted a suggestion that a higher-ranking secured creditor should be entitled to pay off a lower-ranking secured creditor and obtain a release of the asset from that lower-ranking security right. The Commission referred that suggestion to Working Group VI.

57. After discussion, the Commission approved the substance of the recommendations on default and enforcement.

### 10. Insolvency (A/CN.9/WG.VI/WP.21/Add.3)

58. The Commission noted that the chapter on insolvency contained recommendations taken from the UNCITRAL Legislative Guide on Insolvency Law[3] (the "Insolvency Guide") and a small number of additional recommendations that focused on specific issues relating to the treatment of security rights in the case of insolvency. The Commission expressed its appreciation to experts from both Working Group V (Insolvency Law) and Working Group VI for their contribution to what was generally found to be a comprehensive and balanced treatment of security rights in insolvency proceedings. With respect to the additional recommendations, it was widely felt that they addressed important issues in a thorough and clear way that was consistent with the Insolvency Guide.

59. With respect to recommendation B (non-unitary approach to acquisition financing devices), it was stated that the two sets of bracketed language should be set out in a way that would make it clear that they were alternatives.

60. With respect to recommendation E (effectiveness of security rights in insolvency) and recommendation 46, subparagraphs (b) and (c), in response to a

question it was noted that a secured creditor could take steps to make its security right effective against third parties after commencement of insolvency if secured transactions law permitted such rights to be made effective against third parties within specified time periods. It was also stated that the Insolvency Guide addressed the situations where a secured creditor could take steps to enforce its security right.

61. With respect to recommendation G (automatic termination clauses), it was observed that it should clarify that the commencement of insolvency did not invalidate or render unenforceable a contractual clause that relieved a creditor from an obligation to extend credit.

62. After discussion, the Commission approved the substance of the recommendations on insolvency.

## II. Acquisition financing devices (A/CN.9/WG.VI/WP.24/Add.5)

63. It was widely felt that the main difference in the approaches recommended in the chapter on acquisition finance was that, in the unitary approach and one of the two versions of the non-unitary approach to enforcement, acquisition security rights were treated as being functionally equivalent to non-acquisition security rights, while, in the other version of the non-unitary approach to enforcement, retention-of-title devices would be treated as ownership devices.

64. With respect to recommendation 130 (priority of acquisition security rights in inventory), the concern was expressed that, by requiring registration before delivery of the goods to the grantor and notification of inventory financiers on record, the recommendation imposed an undue burden on acquisition financiers.

65. In response, it was stated that recommendation 130 reflected an appropriate balance of interests. The interests of the acquisition financier were protected to the extent that it could obtain priority over a previously registered non-acquisition security right in inventory. The interests of the non-acquisition financier were protected to the extent that it did not have to check the registry before extending credit against new inventory as security and could rely on notification from the acquisition financier. In that connection, it was noted that registration and notification did not have to take place before each and every delivery of inventory to the grantor. A notice that has been registered could cover several transactions between the same parties over a long period of time and registration could be very quick in particular if it was made through electronic means of communication. Similarly, it was stated, a notification of non-acquisition financiers on record could cover several transactions over a long period of time (see recommendation 131).

66. However, it was observed that the concern expressed (see para. 64 above) remained unaddressed, at least to the extent that the burden of registration and notification was placed on small- and medium-size acquisition financiers rather than on non-acquisition financiers that would typically be large financing institutions. It was also pointed out that that burden would create obstacles to commerce. In addition, it was stated that consideration should be given, at least, to setting aside the requirement for the acquisition inventory financier to notify non-acquisition inventory financiers on record. In response, it was observed that the law should take into account not only the interests of suppliers of goods on credit as opposed to other credit providers but rather the interests of all parties involved, including buyers, and thus of the economy as a whole. In that connection, it was said that it

was crucial to create a level playing field that would promote competition among the various credit providers, which could have a beneficial impact on the general availability and the cost of credit.

67. In addition, it was observed that whether acquisition inventory financiers should notify non-acquisition inventory financiers or whether the registry should send out such notices to non-acquisition inventory financiers was a matter of efficiency that could be considered further. In that connection, it was pointed out that both systems could be efficient. After discussion, it was widely felt that, while recommendation 131 was appropriately cast, the issue of notification of non-acquisition inventory financiers on record could be explored further by Working Group VI.

68. With respect to recommendations 130 bis (priority of acquisition security rights over the rights of judgement creditors) and ter (priority of acquisition security rights in attachments to immovable property), the Commission noted that they were in square brackets as they had not yet been considered by Working Group VI. The Commission referred them to the Working Group.

69. As to recommendation 134 (enforcement), the Commission noted that the main difference between the alternatives set out in the recommendation was that the second version of the non-unitary approach resulted in acquisition security rights not being functionally equivalent to non-acquisition security rights. It was stated that, as a result, all the rights and remedies set out in the enforcement chapter of the draft guide would not apply. In addition, it was observed that reference to the regime applicable to ownership rights would inadvertently result in differences from State to State as there was no uniformity in the treatment of ownership devices. On the other hand, it was said that the non-unitary approach would not make sense if it was not different, at least in some respects, from the unitary approach. It was also pointed out that States might adopt slightly different systems depending on their evaluation of what system was most efficient. After discussion, the Commission approved the substance of the unitary approach and referred the non-unitary approach to Working Group VI for further discussion.

70. After discussion, and subject to the qualifications mentioned above, the Commission approved the substance of the recommendations on acquisition financing devices.

## 12. Conflict of laws (A/CN.9/WG.VI/WP.24, A/CN.9/WG.VI/WP.26/Add.4 and A/CN.9/611 and Add.1)

71. The question was raised as to the law that would govern security rights in assets that were moved from State A to State B for a few months and then back to State A. In response, it was stated that, if the assets were mobile assets (e.g. cars or trucks), the creation, third-party effectiveness and priority of a security right in them would be governed by the law of the State in which the grantor was located (recommendation 136). In addition, it was observed that, if those assets were export goods or goods in transit, the creation and third-party effectiveness (but not the priority, which would remain subject to the law of the initial location of the assets) of a security right in them would also be governed by the law of the State of their ultimate destination, provided that the assets would reach that destination within a short period of time after creation of the security right (recommendation 142).

Moreover, it was said that, in all other cases, the security right would remain effective against third parties for a short period after the assets were moved to State B and thereafter only if the third-party effectiveness requirements under the law of State B were met (recommendation 145).

72. With respect to recommendations 139 (law applicable to a security right in a right to payment of funds credited to a bank account) and 148 (law applicable to the enforcement of a security right), the Commission urged Working Group VI to reach agreement, if at all possible, on one of the alternatives set out in each one of those recommendations.

73. With respect to the law applicable to a security right in an attachment to immovable property, the Commission noted with interest the suggestion for the application of the law of the State in which the immovable property was located. The Commission referred that suggestion to Working Group VI.

74. After discussion, the Commission approved the substance of the recommendations on conflict of laws.

### 13. Transition (A/CN.9/WG.VI/WP.26/Add.8)

75. With respect to recommendations 156 to 158 (transition period), it was stated that, rather than addressing creation, they should focus on third-party effectiveness to ensure that a security right that was made effective against third parties under the old law would remain effective against third parties during the transition period. If during that period it was made effective against third parties under the new law, it was said, third-party effectiveness should be continuous.

76. With respect to all the recommendations in the chapter on transition, the Commission noted that they were very general and urged Working Group VI to try to refine and add more details to them so as to strike an appropriate balance between the need to enable parties to benefit from the new law and the need to avoid unsettling business relationships established under the old law.

77. After discussion, and subject to the qualifications mentioned above, the Commission approved the substance of the recommendations on transition.

### 14. Conclusions

78. After conclusion of its discussion of the recommendations of the draft guide, the Commission expressed its appreciation to the Working Group for the results achieved so far in the development of the draft guide and noted that the views expressed and the suggestions made above (see paras. 13-77) would be taken into account in the next version of the draft guide. In addition, the Commission briefly considered the terminology of the draft guide (see A/CN.9/WG.VI/WP.27/Add.1), which was not part of the recommendations but was intended to facilitate their understanding. It was stated that a definition of the term "consumer goods" could be included in the terminology as several recommendations referred to consumer goods. The Commission referred the terminology to Working Group VI.

## B. Future work

79. The Commission next considered its future work. It was noted that Working Group VI was expected to hold another two sessions, one in Vienna from 4 to 8 December 2006 and another in New York from 12 to 16 February 2007 and submit the draft guide for approval by the Commission at its fortieth session, in 2007 (see paras. 272 and 273 (f) below).

80. With respect to the presentation of the material, the suggestion was made that, for the sake of clarity and simplicity, the draft guide might highlight the general recommendations or core principles, for the benefit of those States that might not need all the asset-specific recommendations. The suggestion was also made that the materials should be made available to States as far in advance of the next Commission session as possible. In that connection, one delegation expressed a concern about the complexity of the draft guide, which could jeopardize the acceptability of the draft guide.

81. With respect to future work in the field of secured financing law, the Commission noted that intellectual property rights (e.g. copyrights, patents or trademarks) were increasingly becoming an extremely important source of credit and should not be excluded from a modern secured transactions law. In that connection, it was stated that financing transactions with respect to equipment or inventory often included security rights in intellectual property rights as an essential and valuable component. It was also observed that significant financing transactions involving security rights in all the assets of a grantor would typically include intellectual property rights.

82. In addition, the Commission noted that the recommendations of the draft guide generally applied to security rights in intellectual property rights to the extent they were not inconsistent with intellectual property law (see A/CN.9/WG.VI/WP.26/Add.7, recommendation 3, subparagraph (h)). Moreover, the Commission noted that, as the recommendations had not been prepared with the special intellectual property law issues in mind, the draft guide made a general recommendation that enacting States might consider making any necessary adjustments to the recommendations to address those issues.

83. In order to provide more guidance to States, the suggestion was made that the Secretariat should prepare, in cooperation with international organizations with expertise in the fields of security rights and intellectual property law and in particular the World Intellectual Property Organization (WIPO), a note for submission to the Commission at its fortieth session, in 2007, discussing the possible scope of work that could be undertaken by the Commission as a supplement to the draft guide. In addition, it was suggested that, in order to obtain expert advice and the input of the relevant industry, the Secretariat should organize expert group meetings and colloquiums as necessary.

84. There was broad support in the Commission for those suggestions. It was stated that particular attention should be paid to the representation of all parts of the relevant industry and experts from various regions of the world. It was also observed that one issue of particular importance related to the enforcement of security rights in intellectual property rights, which was jeopardized by their unauthorized use.

85. The suggestion was also made that other issues should also be the subjects of notes by the Secretariat concerning future work in the field of secured financing law. In that connection, the Commission noted that plans for a congress on international trade law to be held in conjunction with the fortieth anniversary session of UNCITRAL (see paras. 256-258 below) included, inter alia, the consideration of topics for future work in the field of secured financing law.

86. After discussion, the Commission requested the Secretariat to prepare, in cooperation with relevant organizations and in particular WIPO, a note discussing the scope of future work by the Commission on intellectual property financing. The Commission also requested the Secretariat to organize a colloquium on intellectual property financing ensuring to the maximum extent possible the participation of relevant international organizations and experts from various regions of the world. (For additional suggestions regarding future work in the field of secured financing law, see paras. 235-251 below).

# IV. Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

## A. Organization of deliberations

87. The Commission considered the revised version of the draft legislative provisions on interim measures and the form of arbitration agreement, and of a draft declaration regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)[4] (the "New York Convention"), adopted by Working Group II (Arbitration and Conciliation) at its forty-fourth session (New York, 23-27 January 2006) (A/CN.9/592). The Commission took note of the summary of the deliberations on the draft provisions and declaration since the thirty-second session of the Working Group (Vienna, 20-31 March 2000) and the background information provided in documents A/CN.9/605, A/CN.9/606 and A/CN.9/607. The Commission also took note of the comments on the draft provisions and declaration that had been submitted by Governments and international organizations, as set out in document A/CN.9/609 and Add.1-6.

## B. Consideration of the draft legislative provisions on interim measures

### 1. General comments

88. The Commission recalled that the provisions had been drafted in recognition not only that interim measures were increasingly being found in the practice of international commercial arbitration, but also that the effectiveness of arbitration as a method of settling commercial disputes depended on the possibility of enforcing

such interim measures (see A/CN.9/485 and Corr.1, para. 78). General agreement was expressed as to the need for a harmonized and widely acceptable model legislative regime governing interim measures granted by arbitral tribunals and their enforcement as well as interim measures ordered by courts in support of arbitration. The Commission recalled that the draft legislative provisions on interim measures and preliminary orders were the result of extensive discussion in the Working Group. The Commission recalled as well that the Working Group, at its forty-second session (New York, 10-14 January 2005), had agreed to include a compromise text of the provisions on preliminary orders, on the basis that those provisions would apply unless otherwise agreed by the parties; that it be made clear that preliminary orders had the nature of procedural orders and not of awards; and that no enforcement procedure would be provided for such orders in section 4 (A/CN.9/573, para. 27).

## 2. Consideration of draft articles

89. The text of the draft legislative provisions considered by the Commission at the current session was as contained in document A/CN.9/605.

### Section 1. Interim measures

### Article 17. Power of arbitral tribunal to order interim measures

*Paragraph 1*

90. It was recalled that paragraph 1 reproduced in part the wording of article 17 of the 1985 UNCITRAL Model Law on International Commercial Arbitration[5] (the "Arbitration Model Law").

91. Paragraph 1 was adopted in substance by the Commission without modification.

*Paragraph 2*

*Subparagraph (b)*

92. A question was raised whether the words "or prejudice to the arbitral process itself", at the end of subparagraph (b), should be retained.

93. It was recalled that the purpose of those words was to clarify that an arbitral tribunal had the power to prevent obstruction or delay of the arbitral process, including by issuing anti-suit injunctions. It was also recalled that, in the Working Group, anti-suit injunctions had given rise to serious reservations on the part of many delegations. In support of deletion, it was stated that anti-suit injunctions did not always have the provisional nature of interim measures but could also relate to substantive matters such as questions relating to the competence of the arbitral tribunal. It was also said that such a provision derogated from the fundamental principle that a party should not be deprived of any judicial remedy to which it was entitled.

94. In response, the Commission noted that, at previous sessions, the Working Group had expressed a preference for the inclusion of anti-suit injunctions in draft article 17. It was also recalled that the words in question should not be understood as merely covering anti-suit injunctions but rather as more broadly covering

injunctions against the large variety of actions that existed and were used in practice to obstruct the arbitral process.

95. After discussion, paragraph 2 was adopted in substance by the Commission without modification.

*Exhaustive nature of the list of functions characteristic of interim measures*

96. The Commission recalled that the Working Group, at its thirty-sixth (New York, 4-8 March 2002) and thirty-ninth (Vienna, 10-14 November 2003) sessions, had considered whether all possible grounds for which an interim measure might need to be granted were covered by the current formulation under article 17, paragraph 2 (see A/CN.9/508, paras. 70-76, and A/CN.9/545, para. 21). It was recalled that the Working Group agreed that, to the extent that all the purposes for interim measures were generically covered by the revised list contained in paragraph 2, the list could be expressed as exhaustive (A/CN.9/545, para. 21). The Commission decided that clarification of that matter should be included in any explanatory material accompanying article 17.

**Article 17 bis. Conditions for granting interim measures**

*Paragraph 1*

*General remark*

"*Urgent need for the measure*"

97. The Commission took note of the decision by the Working Group that the need for urgency should not be a general feature of interim measures. The Commission decided that guidance should be provided in explanatory material indicating how urgency impacted on the operation of the provisions in section 1.

*Subparagraph (a)*

"*Substantially*"

98. A suggestion was made to delete the word "substantially" for the reason that it might introduce an unnecessary and unclear requirement, making it more difficult for the arbitral tribunal to issue an interim measure. In support of that proposal, it was said that it would be preferable to leave it to arbitral practice over time to determine how the balance of inconvenience reflected in subparagraph (a) should be used as a standard.

99. In response, it was pointed out that the text of subparagraph (a), including the word "substantially" was consistent with existing standards in many judicial systems for the granting of an interim measure.

100. After discussion, the Commission decided to retain the word "substantially". Subparagraph (a) was adopted in substance by the Commission without modification.

*Subparagraph (b)*

*"Prima facie"*

101. A proposal was made to delete subparagraph (b) on the basis that interim measures might need to be granted as a matter of urgency and a requirement for an arbitral tribunal to make a determination as to the possibility of success on the merits of the claim might unnecessarily delay matters or appear as a prejudgement of the case. That proposal was not supported for the reason that subparagraph (b) was considered to constitute a necessary safeguard for the granting of interim measures. It was said that that subparagraph was drafted with the intention that the arbitral tribunal would make a preliminary judgement based on the information available to it at the time of its determination.

102. A proposal to add the words "prima facie" to subparagraph (b) so that the arbitral tribunal would not be required to make a full determination on the question of possibility of success on the merits was not supported. In rejecting that proposal, the Commission noted that the term "prima facie" was susceptible to differing interpretations. It was recalled that the Working Group's intention in drafting that subparagraph was to provide a neutral formulation of the standard of proof.

*"provided that"*

103. It was observed that the words "provided that" suggested that the second part of the sentence was a condition for the first part and therefore did not reflect the intention of the Working Group. In order to address that concern, a proposal was made to delete those words and split the subparagraph into two sentences.

104. After discussion, it was agreed that subparagraph (b) should read as follows: "There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination".

*Paragraph 2*

105. Paragraph 2 was adopted in substance by the Commission without modification.

**Section 2. Preliminary orders**

**Article 17 ter. Applications for preliminary orders and conditions for granting preliminary orders**

106. Article 17 ter was adopted in substance by the Commission without modification.

**Article 17 quater. Specific regime for preliminary orders**

*Paragraph 1*

107. Paragraph 1 was adopted in substance by the Commission without modification.

*Paragraph 2*

108. It was noted that paragraph 2 required the arbitral tribunal to give the party against whom a preliminary order was directed an opportunity to present its case at the earliest practicable time. It was noted that while paragraph 1 required the arbitral tribunal to give notice to "all parties", paragraph 2, which referred to "any party against whom a preliminary order is directed to present its case", appeared to be more limited. A proposal was made to extend the application of paragraph 2 by adding after the word "directed" the words "or to any other party". An alternative proposal was made to replace the words "any party against whom a preliminary order is directed", with "the party affected by the preliminary order".

109. It was stated in response that the proposed amendments could unnecessarily complicate the arbitral process. Concern was expressed that the addition of wording such as "any affected party" could provide a person that was not a party to the arbitral proceedings, but nevertheless affected by the preliminary order (for example, a bank), with a right to present its case. It was said that the existing text in paragraph 2 was appropriate in that it gave priority to the party most affected by the preliminary order and did not exclude the possibility that other arbitral parties could respond to the preliminary order if they so wished. It was agreed that the substance of paragraph 2 should be retained but that clarification should be included in explanatory material relating thereto. It was proposed that such explanatory material could indicate that, when an arbitral tribunal invited a party against whom the preliminary order was directed to present its case, that invitation should be copied to all parties and, consistent with general arbitration practice, those parties that wished to react to the preliminary order would do so, even in the absence of a specific invitation. It was also suggested that the explanatory material could clarify that paragraph 2 was not intended to extend to persons that were not party to the arbitration.

110. After discussion, paragraph 2 was adopted in substance by the Commission without modification.

*Paragraph 3*

111. Paragraph 3 was adopted in substance by the Commission without modification.

*Paragraph 4*

112. Paragraph 4 was adopted in substance by the Commission without modification.

*Paragraph 5*

*Time when a preliminary order becomes binding*

113. A question was raised as to when a preliminary order would become binding on the parties. It was recalled that the arbitral tribunal could, at the same time that it grants a preliminary order, also establish a deadline for the requesting party to put security in place and that this possibility was the reason for the flexible wording "in connection with" under article 17 sexies, paragraph 2. It was therefore considered

that a preliminary order could become binding on the parties when granted by the arbitral tribunal.

*Non-enforceability of preliminary orders*

114. The Commission recalled that the Working Group had considered at length whether an enforcement regime should be provided in respect of preliminary orders. The need for including such a regime was questioned given the temporary nature of a preliminary order and the fact that it could raise practical difficulties, such as whether notification of the preliminary order to the other party should be deferred until after the order had been enforced by a court. Further, it was said that parties usually honour interim measures out of respect for the arbitrators' authority and a desire not to antagonize them. The Commission noted that non-enforceability of preliminary orders was central to the compromise reached at the forty-second session of the Working Group (see para. 88 above).

*Seeking relief in a court*

115. The Commission considered a proposal made at the forty-fourth session of the Working Group (New York, 23-27 January 2006) to add the following text, either to paragraph 5 of article 17 quater or in explanatory material: "a party shall not be prevented from seeking any relief in a court because it has obtained such a preliminary order from the arbitral tribunal" (see A/CN.9/592, para. 27). Doubts were expressed as to the need to include such a clarification as it was said that the provision could only operate in exceptional circumstances. It was however pointed out that article 9 of the Arbitration Model Law already protected the right of a party to arbitral proceedings to request from a court an interim measure. It was suggested that that proposal merely clarified the operation of provisions in respect to preliminary orders.

116. The Commission agreed that wording along the following lines: "a party shall not be prevented from seeking any relief it would otherwise be entitled to seek in a court because it has obtained such a preliminary order from the arbitral tribunal" should be included in any explanatory material.

117. After discussion, paragraph 5 was adopted in substance by the Commission without modification.

**Section 3. Provisions applicable to interim measures and preliminary orders**

**Article 17 quinquies. Modification, suspension, termination**

118. Article 17 quinquies was adopted in substance by the Commission without modification.

**Article 17 sexies. Provision of security**

*Paragraph 1*

119. Paragraph 1 was adopted in substance by the Commission without modification.

*Paragraph 2*

120. Paragraph 2 was adopted in substance by the Commission without modification.

**Article 17 septies. Disclosure**

*General remarks*

121. The view was expressed that, under many national laws, the obligation for a party to present facts or arguments against its position was unknown. In addition, it was said that that provision did not contain any sanction in case of non-compliance by the party requesting the measure of its disclosure obligation. A proposal was made to delete paragraph 1 and the second sentence of paragraph 2.

122. It was recalled that the two paragraphs of article 17 septies reflected two distinct disclosure obligations that operated in distinct circumstances. Whereas the obligation in paragraph 1 to disclose changed circumstances related to interim measures, the obligation to disclose all "relevant" circumstances in article 17 septies, paragraph 2, was inspired from the rule in existence in certain jurisdictions that counsel had a special obligation to inform the court of all matters, including those that spoke against its position and that it was considered as a fundamental safeguard and an essential condition, namely to the acceptability of preliminary orders. Similarly, in many other legal systems, a comparable obligation arose from the recognized requirement that parties act in good faith. It was observed that article 17 septies was a result of lengthy discussions in the Working Group and it was recalled that those two paragraphs were carefully drafted, taking account of the type of measures they related to.

123. In support of retaining paragraph 1, it was recalled that the essential purpose of article 17 septies, paragraph 1, was to ensure that a decision to grant an interim measure would be made by the arbitral tribunal on the basis of the most complete record of the facts. Given that the interim measure might be granted at an early stage of the arbitral proceedings, an arbitral tribunal might often be faced with an imperfect record and wish to be informed of any changes concerning the facts on the basis of which the interim measure was granted.

124. Various proposals were made in order to address the objection that the obligation of disclosure contained in article 17 septies, paragraph 1, would be unfamiliar to certain jurisdictions, and therefore difficult to enact in those jurisdictions. In order to provide a more flexible duty of disclosure, adapted to the circumstances of each arbitral proceeding, it was proposed to include as opening words to article 17 septies, paragraph 1, the following words "[i]f so ordered by the arbitral tribunal".

125. A further proposal was made to replace the words at the end of article 17 septies, paragraph 1, "or granted" with the words "if it becomes aware of such a change". That proposal was objected to on the ground that it was implicit in article 17 septies that the obligation to disclose would only arise where a party became aware of such a change. As well, it was suggested that inclusion of those words would create difficulties in practice. It was suggested that, if the proposal were retained, additional words were necessary to require the party requesting the

interim measure to disclose material changes in circumstances where it should have been aware of such changes.

126. A related proposal was made to amend article 17 septies, paragraph 1, along the following lines: "The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted." The second sentence of paragraph 2 would then be amended as follows: "Thereafter, paragraph 1 of this article shall apply."

127. After discussion, the Commission adopted the related proposal referred to under paragraph 126 above, and agreed that the explanatory material should clarify the scope of application of the disclosure obligation contained in article 17 septies.

**Article 17 octies. Costs and damages**

128. Article 17 octies was adopted in substance by the Commission without modification.

**Section 4. Recognition and enforcement of interim measures**

**Article 17 novies. Recognition and enforcement**

129. A proposal was made to delete in paragraph 1 the words "unless otherwise provided by the arbitral tribunal", for the reason that those words introduced an unnecessary condition to enforcement. That proposal did not receive support.

130. Paragraph 1 was adopted in substance by the Commission without modification.

131. Article 17 novies was adopted in substance by the Commission without modification.

**Article 17 decies. Grounds for refusing recognition or enforcement**

*Paragraph 1*

*Alternative proposal*

132. The Commission considered a proposal made by a delegation, contained in document A/CN.9/609/Add.5, footnote 2 to paragraph 8. It was explained that the proposal was intended to simplify the text and avoid any cross reference to article 36 of the Arbitration Model Law. The application of article 36 to interim measures was said to be of limited relevance in view of the difference in nature between interim measures and award on the merits. Some support was expressed for the proposed shorter draft on the basis that it was concise and set forth rules that were specifically geared to the recognition and enforcement of interim measures, as opposed to the text of draft article 17 decies, which essentially mirrored rules established in the New York Convention in respect of the recognition and enforcement of arbitral awards.

133. However, reservations were expressed against the general policy reflected in the proposed shorter draft, which was said to exclude a number of important details that were set out in draft article 17 decies.

134. After discussion, paragraph 1 was adopted in substance by the Commission without modification.

*Paragraph 2*

135. It was said that, when a court was called upon to enforce an interim measure, under article 17 decies, paragraph 1 (a)(i) (which referred to the grounds set forth in article 36, sub-subparagraphs 1 (a)(i), (ii), (iii) or (iv)), its decision should not have an effect beyond the limited sphere of recognition and enforcement of the interim measure. The Commission agreed that any explanatory material should clarify that the purpose of article 17 decies, paragraph 2, was to confine the power of a court to the determination of recognition and enforcement of the interim measure only.

136. Paragraph 2 was adopted in substance by the Commission without modification.

*Footnote*

137. The footnote to article 17 decies was adopted in substance by the Commission without modification.

**Section 5. Court-ordered interim measures**

**Article 17 undecies. Court-ordered interim measures**

*Drafting proposal*

138. It was suggested that the text of article 17 undecies might be simplified, along the following lines: "A court shall have the same power of issuing an interim measure in relation to arbitration proceedings as it has in relation to proceedings in the courts, including in cases where the place of the arbitration proceedings is in a State other than the court's. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration."

139. That proposal received support. It was clarified that the purpose of article 17 undecies was to preserve the power of courts to issue interim measures in support of arbitration, but should not be understood as expanding the powers of the court for interfering in the arbitral process. The Commission agreed that that matter should be clarified in any explanatory material to that provision.

"*including in cases where the place of the arbitration proceedings is in a State other than the court's*"

140. A suggestion was made that the phrase "where the place of the arbitration proceedings is in a State other than the court's" appearing in the proposal (see para. 138 above) was unnecessary given the intention to add article 17 undecies to the list of articles contained under article 1, paragraph 2, of the Arbitration Model Law. That suggestion did not receive support because it was considered that those words provided necessary clarification.

141. After discussion, the Commission agreed that article 17 undecies would read as follows: "A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration". It was explained that that language was more closely aligned to the language used in the Arbitration Model Law and

that replacing the words "the court" by the word "courts" at the end of the first sentence was intended to clarify that there was no intention to refer to specific court proceedings, either domestic or foreign. Article 17 undecies was meant to encompass the power of issuing interim measures in relation to court proceedings, domestic or international, as the case may be. However, article 17 undecies did not relate to the function of assistance and supervision of arbitration proceedings (juge d'appui) as referred to in article 6 of the Arbitration Model Law and, consequently, under no circumstances should article 17 undecies be construed as expanding the powers of courts in relation to those functions.

142. The Commission agreed that any explanatory material to article 17 undecies should clarify that the court could exercise jurisdiction on arbitration matters, whether the place of arbitration is located in the enacting State or in another State and that the provision should not be construed as expanding the territorial jurisdiction of courts.

*Placement of article 17 undecies*

143. The Commission considered whether article 17 undecies should be located elsewhere in another part of the Arbitration Model Law given that it dealt with court-ordered interim measures which might not easily fit into a chapter intended to deal mostly with interim measures granted by arbitral tribunals. One suggestion was to place article 17 undecies following article 9 of the Arbitration Model Law, which dealt with interim measures granted by courts. However, given that article 9 was located within chapter II of the Arbitration Model Law, which related to the arbitration agreement, that option was not considered appropriate. The Commission agreed that a text suggesting that States could place article 17 undecies in the most appropriate part of their enacting legislation could be included in explanatory material accompanying that provision.

### 3. Consideration of amendment to article 1, paragraph 2, of the Arbitration Model Law

144. The text of the draft amendment to article 1, paragraph 2, of the Arbitration Model Law as considered by the Commission at the current session was as contained in document A/CN.9/605, paragraph 23.

145. The proposed amendment to article 1, paragraph 2, which consisted in adding a reference to articles 17 novies, 17 decies and 17 undecies within the list of excepted articles was adopted by the Commission.

## C. Consideration of the draft legislative provision on the form of arbitration agreement

### 1. General comments

146. The Commission exchanged views on the draft legislative provision recalling that, in order to ensure a uniform interpretation of the form requirement that responded to the needs of international trade, it was desirable to prepare a modification of article 7, paragraph 2, of the Arbitration Model Law, with an accompanying guide to enactment and to formulate a statement addressing the

interpretation of article II, paragraph 2, of the New York Convention, that would reflect a broad and liberal understanding of the form requirement.

147. It was recalled that the Working Group's intention in revising article 7 of the Arbitration Model Law was to update domestic laws on the question of the writing requirement for the arbitration agreement, while preserving enforceability of such agreements as foreseen in the New York Convention. The Commission had before it two texts for consideration, the first gave a detailed description of how the writing requirement could be satisfied (the revised draft article 7) and the other omitted the writing requirement altogether (the alternative proposal). The text of the draft legislative provisions considered by the Commission at the current session was as contained in document A/CN.9/606.

## 2. Consideration of the revised draft article 7

*Paragraph 1*

148. It was recalled that paragraph 1 reproduced article 7, paragraph 1, of the Arbitration Model Law. A proposal was made to delete the second sentence in that paragraph for the reason that it was considered unnecessary. That proposal was not accepted.

149. After discussion, paragraph 1 was adopted in substance by the Commission without modification.

*Paragraph 2*

150. Paragraph 2 was adopted in substance by the Commission without modification.

*Paragraph 3*

151. The Commission noted that paragraph 3 defined the writing requirement and sought to clarify how the writing requirement could be fulfilled.

152. Various proposals were made to amend paragraph 3. One proposal was to add as the opening words of paragraph 3: "Without prejudice to the parties' consent in the arbitration agreement or contract" in order to emphasize the importance of the consent of the parties. A related proposal was made to redraft paragraph 3 as follows: "an arbitration agreement or contract may be concluded orally, by conduct or by any other means of proof which manifest the will of the parties". Another proposal, aimed at clarifying the meaning of paragraph 3 was as follows: "The form prescribed in paragraph 2 is met if the content of the arbitration agreement is recorded in any form, an arbitration agreement is in writing, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means". Yet another proposal was made along the lines suggested in document A/CN.9/609. Those proposals did not receive support.

153. The Commission noted that the Working Group, at its forty-fourth session (New York, 23-27 January 2006), had discussed whether the purpose of the writing requirement was to provide a record as to the consent of the parties to arbitrate or as to the content of the arbitration agreement. At that session, it was observed that what was to be recorded was the content of the arbitration agreement as opposed to the meeting of the minds of the parties or any other information regarding the

formation of the agreement (A/CN.9/592, para. 61). The Commission confirmed that paragraph 3 dealt with the definition of the form of the arbitration agreement and the question whether the parties actually reached an agreement to arbitrate was a substantive issue to be left to national legislation. In that context, the Commission took note of a comment that, by contrast with certain national laws under which the written form of the arbitration agreement was prescribed to achieve certainty about the parties' will to arbitrate, the revised text of paragraph 3 achieved a significant change of perspective by shifting the focus of the provision on reaching certainty regarding the substance of the rights and obligations created by the arbitration agreement, including rules that might govern the arbitration proceedings. It was also pointed out that the question of proof of the content of the agreement and that of proof of the consent could not be dissociated from each other, and the writing could only prove existence of the arbitration agreement if at the same time it established the parties' agreement to arbitrate.

154. The Commission confirmed that a mere reference in an oral contract to a set of arbitration rules or to a law governing the arbitral procedure were cases that were not intended to be covered by paragraph 3 and that such a clarification should be included in any explanatory material accompanying that paragraph. The Commission agreed that further clarification as to the factual situations that were intended to be covered by paragraph 3 could be included in any explanatory material accompanying that provision.

155. After discussion, paragraph 3 was adopted in substance by the Commission without modification.

*Paragraph 4*

156. It was observed that paragraph 3 already provided that an arbitration agreement could be concluded "by any other means", and that those words encompassed the conclusion of an arbitration agreement by electronic means referred to under paragraph 4. The need to retain paragraph 4 was therefore questioned.

157. In favour of its deletion, it was said that it was inappropriate for legislation relating to arbitration to contain provisions on electronic communications and that the definitions provided under paragraph 4 were already contained in other UNCITRAL instruments, namely the UNCITRAL Model Law on Electronic Commerce[6] and the Convention on Electronic Contracts. A proposal was made to delete paragraph 4 and add, at the end of paragraph 3, words along the following lines: "including electronic communications". An alternative proposal was made to retain paragraph 4, but simplify its content by referring in footnotes to the definitions that were already contained in the UNCITRAL Model Law on Electronic Commerce and the Convention on Electronic Contracts. Those proposals did not receive support.

158. In favour of retaining paragraph 4, it was said that the language used in paragraph 4 was consistent with that used in article 9, paragraph 2, of the Convention on Electronic Contracts, and the definitions of "electronic communication" and "data message" reproduced the definitions contained under subparagraphs (b) and (c) of article 4 of that Convention. It was observed that

maintaining consistency between UNCITRAL texts was crucial and that the definitions contained under paragraph 4 would provide useful guidance.

159. After discussion, paragraph 4 was adopted in substance by the Commission without modification.

*Paragraph 5*

160. A comment was made that the situation addressed by paragraph 5 rarely arose in practice, and that that provision could be deleted as paragraph 3 already contemplated the situation covered under paragraph 5. It was objected that that provision was already part of article 7 of the Arbitration Model Law and deleting it might be misinterpreted as invalidating arbitration agreements concluded by an exchange of statements of claim and defence in which the arbitration agreement was alleged by one party and not denied by the other.

161. After discussion, paragraph 5 was adopted in substance by the Commission without modification.

*Paragraph 6*

162. Paragraph 6 was adopted by the Commission without modification.

### 3. Consideration of the alternative proposal to draft article 7

163. The Commission noted that the alternative proposal omitted entirely the writing requirement and thereby recognized oral arbitration agreements as valid.

164. A question was raised whether the alternative proposal should be retained. It was said that the revised draft article 7 established the minimum requirements that should apply in respect of the form of arbitration agreement, whereas the alternative proposal went much further and did away with all form requirements in order, for example, to recognize the validity of oral arbitration agreements. While the alternative proposal met with considerable interest, the view was expressed that it might depart too radically from traditional legislation, including the New York Convention, to be readily acceptable in many countries.

165. In support of retention of the alternative proposal, it was noted that, in several jurisdictions that had removed the written form requirement for arbitration agreements, that removal had not given rise to significant disputes as to the validity of arbitration agreements. In such jurisdictions, it was said that the provision contained in the revised draft article 7 would be unlikely to be adopted and that therefore the alternative proposal should be retained. In addition, it was argued that the trend was towards relaxing the form requirement for the arbitration agreement and that therefore the Arbitration Model Law, with a view to providing a solution for the future, should offer to national legislators the possibility to opt for the alternative proposal.

166. In addition, it was observed that State courts tended to interpret the New York Convention in light of the provisions of the Arbitration Model Law and that the revised draft would indicate to States that the written form requirement contained in article II, paragraph 2, of the New York Convention should be interpreted in a more liberal manner. It was observed as well that according to article V, paragraph 1 (a), of the New York Convention, the issue of the validity of the arbitration agreement

(in the context of a request for enforcement of the arbitral award) was governed by the law of the place where the award was made and that therefore, if the arbitration agreement was valid pursuant to the law of the place of arbitration, the award was enforceable pursuant to the New York Convention in its States parties. It was further observed that State courts could still refer to article VII, paragraph 1, of the New York Convention to apply a more favourable domestic legislation.

167. After discussion, the alternative proposal was adopted in substance by the Commission without modification.

### 4. Presentation of the revised draft article 7 and the alternative proposal

168. It was questioned whether the revised draft article 7 and the alternative proposal should be presented as options in the Arbitration Model Law. Concern was expressed that presenting options in the Arbitration Model Law would not encourage harmonization of legislation in that field and might potentially create difficulties for enacting States.

169. It was suggested that the alternative proposal could be inserted as a footnote to the revised draft article 7 or in any explanatory material. It was objected that both texts represented two different approaches on the question of definition and form of arbitration agreement, the first to liberalize the writing requirement and the second to suppress that requirement altogether, and presenting the alternative text as a footnote to the revised draft article 7 would therefore be unsatisfactory.

170. After discussion, the Commission decided to present both the revised draft article 7 and the alternative proposal as options in the text of the Arbitration Model Law and to include guidance for enacting States in respect of each option.

### 5. Consideration of article 35, paragraph 2, of the Arbitration Model Law

171. It was noted that article 35, paragraph 2, of the Arbitration Model Law, which was modelled on article IV of the New York Convention, provided that the party relying on an award or applying for its enforcement should supply the duly authenticated original award or a duly certified copy thereof, as well as the original arbitration agreement or a duly certified copy thereof. The Commission observed that, in its deliberations regarding the written form of arbitration agreements, the Working Group had considered it necessary to ensure that a modified understanding of the writing requirement (article 7 of the Arbitration Model Law, and article II, para. 2, of the New York Convention) would be reflected in article 35, paragraph 2, of the Arbitration Model Law, through an amendment to that article as envisaged in document A/CN.9/606, paragraph 22.

172. A proposal was made to delete the word "certified" from the first and second sentences in article 35, paragraph 2, for the reason that inclusion of such a requirement had created, in some cases, uncertainty as to who could undertake the certification and what the certification would consist of, which could hinder unnecessarily the enforcement of an award. In that respect, it was noted that the question of the need for certification or similar evidence regarding the authenticity of a text or its translation was a matter that was better left to the general law of evidence, or court rules, and to judicial discretion than dealt with by way of imposed requirements that could be overly cumbersome and open to differing interpretations.

173. After discussion, the Commission agreed that article 35, paragraph 2, should read as follows: "The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language". It was agreed that, in line with the footnote to article 35, the conditions set forth in that article were intended to set maximum standards and that the explanatory material should clarify that deletion of the certification requirement should not be read as ruling out the possibility that certification might be required by judges, where appropriate and in accordance with local law.

### 6. Additional provision

174. The Commission considered whether the Arbitration Model Law should include a provision along the lines of article 7 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)[7] (the "United Nations Sales Convention"), which was designed to facilitate interpretation by reference to internationally accepted principles. The Commission observed that similar provisions were included in other model laws prepared by the Commission, including article 3 of the UNCITRAL Model Law on Electronic Commerce.

175. The Commission agreed that the inclusion of such a provision would be useful and desirable because it would promote a more uniform understanding of the Arbitration Model Law. The Commission agreed that the provision should read as follows:

"**Article 2 A. International origin and general principles**

"1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

"2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based."

### 7. Explanatory material

176. It was noted that recent model laws adopted by UNCITRAL were accompanied by a guide to enactment and use. Such guides were generally regarded as useful instruments for national legislators and other users of UNCITRAL standards. They also furthered the process of harmonization of laws. After discussion, the Commission agreed that it would be useful to prepare a guide to enactment and use for the entire Arbitration Model Law as revised. The Secretariat was requested to prepare a draft guide for consideration at future sessions of the Working Group and the Commission.

## D. Consideration of the draft declaration regarding the interpretation of articles II (2) and VII (1) of the New York Convention

177. The text of the draft declaration regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention, as

considered by the Commission, was contained in paragraph 4 of document A/CN.9/607.

178. A question was raised as to whether it was appropriate for the Commission to issue a declaration on the interpretation of a multilateral treaty. The Commission recalled that it had a mandate, as defined in its founding General Assembly resolution 2205 (XXI), inter alia, to promote "ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade".[8] Therefore, issuing a recommendation that was persuasive rather than binding in nature, for the benefit of users of the treaty, including law-makers, arbitrators, judges and commercial parties, was within the mandate of the Commission. Such a recommendation was said to be appropriate and, in the circumstances, particularly desirable as it would encourage the development of rules favouring the validity of arbitration agreements in a wider variety of situations and encourage States to adopt the revised version of article 7 of the Arbitration Model Law.

179. The Commission noted the discussions of the Working Group on the form of the document, including the question whether the document should take the form of a declaration or a recommendation (A/CN.9/485, paras. 65-69). The Commission agreed that the purpose of the document, in line with the Commission's mandate, was to propose a harmonizing interpretation of certain provisions of the New York Convention, without interfering with the competence of the State parties to the New York Convention to issue binding declarations regarding the interpretation of that treaty.

180. Against that background, the Commission agreed that the most appropriate form for such a document was that of a recommendation, instead of a declaration which could be misinterpreted as to its nature. The title of the document was amended accordingly. The Commission also agreed to bring forward the reference to its mandate in the opening paragraphs of the recommendation.

## E. Adoption of legislative provisions and recommendation

181. The Commission, after considering the text of the draft model legislative provisions relating to the definition and form of arbitration agreements and interim measures, and the text of the draft recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention, adopted the following decision at its 834th meeting, on 7 July 2006:

> "*The United Nations Commission on International Trade Law*,
>
> "*Recalling* its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,
>
> "*Recalling also* General Assembly resolution 40/72 of 11 December 1985 noting the adoption of the Model Law on International Commercial Arbitration by the United Nations Commission on International Trade Law and

recommending that all States give due consideration to the Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice,

"*Recognizing* the value of arbitration as a method of settling disputes arising in the context of international commercial relations,

"*Recognizing also* the need for provisions in the Model Law to conform to current practices in international trade and modern means of contracting with regard to the form requirement of arbitration agreement and the granting of interim measures,

"*Believing* that revised articles of the Model Law on the requirement of written form and interim measures, together with explanatory material relating thereto, will significantly enhance the operation of the Model Law,

"*Noting* that the preparation of the revised articles of the Model Law was the subject of due deliberation and extensive consultations with Governments and interested circles and would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international commercial disputes,

"*Believing* that, in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, is particularly timely,

"1. *Adopts* the revised articles of the UNCITRAL Model Law on International Commercial Arbitration as they appear in annex I to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session;[9]

"2. *Recommends* that all States give favourable consideration to the enactment of the revised articles of the UNCITRAL Model Law on International Commercial Arbitration, or the revised UNCITRAL Model Law on International Commercial Arbitration, when they enact or revise their laws, in view of the desirability of uniformity of the law of dispute settlement procedures and the specific needs of international commercial arbitration practice;

"3. *Adopts* the recommendation regarding the interpretation of articles II, paragraph 2, and VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, as it appears in annex II to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session."

## F. Future work in the field of settlement of commercial disputes

182. With respect to future work in the field of settlement of commercial disputes, the Commission had before it two notes entitled "Possible future work in the field of settlement of commercial disputes" (A/CN.9/610 and Corr.1) and "Possible future

work in the field of settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules" (A/CN.9/610/Add.1).

183. The Commission took note of suggestions of the Working Group made at its forty-fourth session (New York, 23-27 January 2006) that priority consideration be given to, inter alia, possible revision of the UNCITRAL Arbitration Rules;[10] arbitrability of intra-corporate disputes (and possibly other issues relating to arbitrability, for example, arbitrability in the fields of intellectual property rights, investment disputes, insolvency or unfair competition); and online dispute resolution (see A/CN.9/592, paras. 89-95).

184. It was agreed that the topic of revising the UNCITRAL Arbitration Rules should be given priority. The Commission noted that, as one of the early instruments developed by UNCITRAL in the field of arbitration, the UNCITRAL Arbitration Rules were recognized as a very successful text, adopted by many arbitration centres and used in many different instances, such as, for example, in investor-State disputes. In recognition of the success and status of the UNCITRAL Arbitration Rules, the Commission was generally of the view that any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit or its drafting style, and should respect the flexibility of the text rather than make it more complex. It was suggested that the Working Group should undertake to define carefully the list of topics that might need to be addressed in a revised version of the UNCITRAL Arbitration Rules. It was observed that the list contained in document A/CN.9/610/Add.1 provided a useful starting point in that respect.

185. The topic of arbitrability was said to be an important question, which should also be given priority. It was said that it would be for the Working Group to consider whether arbitrable matters could be defined in a generic manner, possibly with an illustrative list of such matters, or whether the legislative provision to be prepared in respect of arbitrability should identify the topics that were not arbitrable. It was suggested that a study might be undertaken of the question of arbitrability and other forms of alternative dispute resolution in the context of immovable property, unfair competition and insolvency. It was cautioned, however, that the topic of arbitrability was a matter raising questions of public policy, which was notoriously difficult to define in a uniform manner, and that providing a pre-defined list of arbitrable matters could unnecessarily restrict a State's ability to meet certain public policy concerns that were likely to evolve over time.

186. Other topics mentioned for possible inclusion in the future work of the Working Group included issues raised by online dispute resolution. It was suggested that the UNCITRAL Arbitration Rules, when read in conjunction with other instruments, such as the UNCITRAL Model Law on Electronic Commerce and the Convention on Electronic Contracts, already accommodated a number of issues arising in the online context. Another topic mentioned was the issue of arbitration in the field of insolvency. Yet another suggestion was to address the impact of anti-suit injunctions on international arbitration. A further suggestion was to consider clarifying the notions used in article I, paragraph 1, of the New York Convention, of "arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought" or "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought", which were said to have raised uncertainty in some State courts. The Commission also heard with interest a statement made on behalf of the International

Cotton Advisory Committee suggesting that work could be undertaken by the Commission to promote contract discipline, effectiveness of arbitration agreements and enforcement of awards in that industry.

187. After discussion, the Commission was generally of the view that several matters could be dealt with by the Working Group in parallel. The Commission agreed that the Working Group should undertake work on the question of a revision of the UNCITRAL Arbitration Rules. It was also agreed that the issue of arbitrability was a topic that the Working Group should also consider. As to the issue of online dispute resolution, it was agreed that the Working Group should place the topic on its agenda but, at least in an initial phase, should consider the implications of electronic communications in the context of the revision of the UNCITRAL Arbitration Rules.

## V. Procurement: progress report of Working Group I

188. At its thirty-sixth and thirty-seventh sessions, in 2003 and 2004 respectively, the Commission considered the possible updating of the UNCITRAL Model Law on Procurement of Goods, Construction and Services[11] and its Guide to Enactment, on the basis of notes by the Secretariat (A/CN.9/539 and Add.1 and A/CN.9/553).[12] At its thirty-seventh session, the Commission agreed that the Model Law would benefit from being updated to reflect new practices, in particular those which resulted from the use of electronic communications in public procurement, and the experience gained in the use of the Model Law as a basis for law reform in public procurement as well as possible additional issues. The Commission decided to entrust the preparation of proposals for the revision of the Model Law to its Working Group I (Procurement) and gave the Working Group a flexible mandate to identify the issues to be addressed in its considerations. The Commission noted that, in updating the Model Law, care should be taken not to depart from the basic principles of the Model Law and not to modify the provisions whose usefulness had been proven.[13]

189. The Working Group commenced its work pursuant to that mandate at its sixth session (Vienna, 30 August-3 September 2004). At that session, it decided to proceed with in-depth consideration of the topics suggested in the notes by the Secretariat (A/CN.9/WG.I/WP.31 and A/CN.9/WG.I/WP.32)[14] in sequence at its future sessions (A/CN.9/568, para. 10).

190. At its thirty-ninth session, the Commission took note of the reports of the eighth (Vienna, 7-11 November 2005) and ninth (New York, 24-28 April 2006) sessions of the Working Group (see A/CN.9/590 and A/CN.9/595, respectively).

191. The Commission was informed that, at its eighth and ninth sessions, the Working Group continued the in-depth consideration of the topics related to the use of electronic communications and technologies in the procurement process. The Commission noted that, pursuant to the Working Group's decision at its seventh session to accommodate the use of electronic communications and technologies (including electronic reverse auctions) in the Model Law (A/CN.9/575, para. 9),[15] the Working Group, at its ninth session, had come to preliminary agreement on the draft revisions to the Model Law and the Guide that would be necessary in that regard. The Commission also noted that the Working Group had decided that at its subsequent sessions it would proceed with the in-depth consideration of the

proposed revisions to the Model Law and the Guide addressing the remaining aspects of electronic reverse auctions and the investigation of abnormally low tenders, and would take up the topics of framework agreements and suppliers' lists (A/CN.9/595, para. 9).

192. The Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the Model Law. In the context of its consideration of agenda item 14, Coordination and cooperation, with reference to document A/CN.9/598/Add.1 (see para. 232 below), the Commission recommended that the Working Group, in updating the Model Law and the Guide, should take into account issues of conflict of interest and should consider whether any specific provisions addressing those issues would be warranted in the Model Law. (For the following two sessions of the Working Group, see para. 273 (a) below.)

## VI. Transport law: progress report of Working Group III

193. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) to prepare, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods by sea, such as the scope of application, the period of responsibility of the carrier, the obligations of the carrier, the liability of the carrier, the obligations of the shipper and transport documents.[16] At its thirty-fifth session, in 2002, the Commission approved the working assumption that the draft convention on transport law should cover door-to-door transport operations.[17] At its thirty-sixth, thirty-seventh and thirty-eighth sessions, in 2003, 2004 and 2005, respectively, the Commission noted the complexities involved in the preparation of the draft convention, and authorized the Working Group, on an exceptional basis, to hold its sessions on the basis of two-week sessions.[18]

194. At its thirty-ninth session, the Commission took note with appreciation of the progress made by the Working Group at its sixteenth (Vienna, 28 November-9 December 2005) and seventeenth (New York, 3-13 April 2006) sessions (see A/CN.9/591 and Corr.1 and A/CN.9/594, respectively).

195. The Commission was informed that, at its sixteenth and seventeenth sessions, the Working Group had proceeded with its second reading of the draft convention and had made good progress regarding a number of difficult issues, including those regarding jurisdiction, arbitration obligations of the shipper, delivery of goods, including the period of responsibility of the carrier, the right of control, delivery to the consignee, scope of application and freedom of contract, and transport documents and electronic transport records. Also considered by the Working Group were the topics of transfer of rights and, more generally, the issue of whether any of the substantive topics currently included in the draft convention should be deferred for consideration in a possible future instrument. The Commission was also informed that the Secretariat had facilitated the initiation of consultations that were currently under way between experts from Working Group III (Transport Law) and experts from Working Group II (Arbitration and Conciliation) with the hope that an agreement could be found on the provisions in the draft convention relating to arbitration.

196. The Commission was informed that, with a view to continuing the acceleration of the exchange of views, the formulation of proposals and the emergence of consensus in preparation for a third and final reading of the draft convention, a number of delegations participating in the sixteenth and seventeenth sessions of the Working Group had continued their initiative of holding informal consultations for the continuation of discussion between sessions of the Working Group.

197. Some concerns were expressed regarding the treatment in the draft convention of the issues of scope of application and freedom of contract. The freedom given to the parties to volume contracts to derogate from provisions of the draft convention was said to constitute a significant departure from the prevailing regime in transport law conventions. It was argued that, in view of the broad definition of volume contracts in article 1 of the draft convention, freedom of contract might potentially cover almost all carriage of goods by shipping lines falling within the scope of the draft convention. It was further argued that the conditions for valid derogation from the draft convention did not require the express consent to the derogations by both parties, which was said to open up the possibility that standard contracts containing derogating clauses could be submitted to the shippers.

198. There was support for those concerns and for the need for the Working Group to consider them. However, there were also objections to both the criticism of the treatment of freedom of contract as well as to the characterization of the alleged problems created by the draft convention. It was said, in that connection, that freedom of contract was an important element in the overall balance of the draft convention and that the current text reflected an agreement that had emerged in the Working Group after extensive discussions.

199. The Commission took note of the concerns related to the treatment in the draft convention of the issues of scope of application and freedom of contract and of the joint proposal by Australia and France on freedom of contract under volume contracts set out in document A/CN.9/612, as well as the expressions of support for the current draft provisions. The Commission was of the view that the Working Group was the proper forum to consider those substantive points at the present stage and expressed its confidence that the Working Group would deal with those concerns in the ongoing discussions on the draft convention. The Commission noted the views expressed by a number of delegations on the need for the outcome of the deliberations of the Working Group to receive wide international acceptance.

200. With respect to a possible time frame for completion of the draft convention, the Commission was informed that the Working Group planned to complete its second reading of the draft convention at the end of 2006 and the final reading at the end of 2007, with a view to presenting the draft convention for finalization by the Commission in 2008. The Commission agreed that 2008 would be a desirable goal for completion of the project, but that it was not desirable to establish a firm deadline at the present stage. The Commission, noting the complexities and magnitude of the work involved in the preparation of the draft convention, authorized the Working Group to hold its sessions on the basis of two-week sessions. (For the next two sessions of the Working Group, see para. 273 (c) below).

# VII. Possible future work in the area of electronic commerce

201. At its thirty-eighth session, in 2005, the Commission considered the possibility of undertaking future work in the area of electronic commerce in the light of a note submitted by the Secretariat in pursuance of the Commission's mandate to coordinate international legal harmonization efforts in the area of international trade law (A/CN.9/579).[19] In that note, the Secretariat had summarized the work undertaken by other organizations in various areas related to electronic commerce, which were indicative of the various elements required to establish a favourable legal framework for electronic commerce.[20]

202. The Commission, at that time, welcomed the information provided in the note by the Secretariat and confirmed the usefulness of such a cross-sectoral overview of activities from the viewpoint both of its coordination activities and of the information requirements of Member States. The Commission requested the Secretariat to prepare a more detailed study, for consideration by the Commission at its thirty-ninth session, in 2006, which should include proposals as to the form and nature of a comprehensive reference document, which the Commission might in the future consider preparing with a view to assisting legislators and policymakers around the world.[21]

203. At its thirty-ninth session, the Commission had before it a note prepared by the Secretariat following that request (A/CN.9/604). The note identified the following areas as possible components of a comprehensive reference document: (a) authentication and cross-border recognition of electronic signatures; (b) liability and standards of conduct for information-services providers; (c) electronic invoicing and legal issues related to supply chains in electronic commerce; (d) transfer of rights in tangible goods and other rights through electronic communications; (e) unfair competition and deceptive trade practices in electronic commerce; and (f) privacy and data protection in electronic commerce. The note also identified other issues which, although in a more summary fashion, could be included in such a document: (a) protection of intellectual property rights; (b) unsolicited electronic communications (spam); and (c) cybercrime.

204. The Commission welcomed the information and the proposals submitted by the Secretariat. The Commission reiterated its belief that the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures,[22] and the Convention on Electronic Contracts, provided a good basis for States to facilitate electronic commerce, but only addressed a limited number of issues.

205. The Commission heard expressions of support for the view that the task of legislators and policymakers, in particular in developing countries, might be greatly facilitated if the Commission were to formulate a comprehensive reference document dealing with the topics identified by the Secretariat. Such a document, it was also said, might also assist the Commission to identify areas in which it might itself undertake future harmonization work.

206. However, there was also support for the view that the range of issues identified by the Secretariat was too wide and that the scope of the comprehensive reference document might need to be reduced. Given the variety of issues involved, it was agreed that Member States might need more time, at least to consider the

desirability and possible scope of future legislative work on those issues, and that the Commission should postpone a final decision on the topics to be covered until its fortieth session, in 2007. The Commission further agreed that its final decision on that matter might be facilitated if it could review a sample portion of the comprehensive reference document on a discrete topic. The Commission therefore requested the Secretariat to prepare a document dealing specifically with issues related to authentication and cross-border recognition of electronic signatures, for review at its fortieth session, in 2007.

## VIII. Possible future work in the area of insolvency law

207. The Commission had before it a note by the Secretariat (A/CN.9/596) reporting on the international colloquium that took place from 14 to 16 November 2005, in Vienna, to discuss a series of proposals, made to the Commission at its thirty-eighth session, in 2005 (A/CN.9/582 and Add.1-7),[23] for future work in the area of insolvency law, specifically on treatment of corporate groups in insolvency, cross-border insolvency protocols in transnational cases, post-commencement financing in international reorganizations, directors' and officers' responsibilities and liabilities in insolvency and pre-insolvency cases, and commercial fraud and insolvency. The Commission also took note of document A/CN.9/597.

208. The Commission expressed its appreciation for the organization of the colloquium, noting the topics that had been discussed and the issues that had been raised. With respect to the proposals made by the Secretariat for possible future work, the Commission recalled, in particular, that treatment of corporate groups in insolvency had arisen in the context of the development of the Insolvency Guide, and that the treatment in the Insolvency Guide was either limited to a brief introduction, as in the case of treatment of corporate groups in insolvency, or limited to domestic insolvency law, as in the case of post-commencement financing. It was acknowledged that undertaking further work on those two topics would build upon and complement the work already completed by the Commission. The Commission also noted that the proposal on cross-border insolvency protocols was closely related and complementary to the promotion and use of a text already adopted by the Commission, the Model Law on Cross-Border Insolvency,[24] which had been enacted by 11 States and was the subject of increasing interest and discussion. It was therefore appropriate to consider how implementation of the coordination and cooperation provisions of the Model Law could be facilitated by making the legal and judicial experience with respect to the negotiation, use and content of protocols available, in some form, to the international legal community.

209. After consideration, the Commission agreed that:

(a) The treatment of corporate groups in insolvency was sufficiently developed for the topic to be referred to Working Group V (Insolvency Law) for consideration in 2006 and that the Working Group should be given the flexibility to make appropriate recommendations to the Commission regarding the scope of its future work and the form it should take, depending upon the substance of the proposed solutions to the problems the Working Group would identify under that topic;

(b) Post-commencement financing should initially be considered as a component of work to be undertaken on insolvency of corporate groups, with the Working Group being given sufficient flexibility to consider any proposals for work on additional aspects of the topic;

(c) Initial work to compile practical experience with respect to negotiating and using cross-border insolvency protocols should be facilitated informally through consultation with judges and insolvency practitioners. A preliminary progress report on that work should be presented to the Commission for further consideration at its fortieth session, in 2007;

(d) The Secretariat should have flexibility to organize the work to be undertaken with respect to topics (b) and (c), as appropriate, in view of limited resources;

(e) Work being undertaken by other organizations in relation to the topics of directors' and officers' responsibilities in insolvency and pre-insolvency, and insolvency and commercial fraud should be monitored to facilitate consideration, at some future date, of work that might be undertaken by the Commission.

210. The Commission noted that the topic of arbitrability of insolvency issues and the use of other alternative dispute resolution processes (such as mediation and facilitation) in the context of insolvency had been discussed as a possible topic for future work which would be undertaken by Working Group II (Arbitration and Conciliation), with input from Working Group V (Insolvency Law) (see paras. 183 and 185-187 above).

## IX. Possible future work in the area of commercial fraud

211. The Commission had before it a note by the Secretariat (A/CN.9/600) reporting on ongoing and possible future work in the area of commercial fraud. The Commission recalled that it had previously considered the subject of commercial fraud at its thirty-fifth to thirty-eighth sessions, from 2002 to 2005.[25]

212. It was recalled that, at its thirty-seventh session, in 2004, the Commission had agreed that the Secretariat should facilitate, whenever appropriate, the discussion of examples of commercial fraud in the particular contexts of projects worked on by the Commission so as to enable delegates involved in those projects to take the problem of fraud into account in their deliberations. In addition, with a view towards education, training and prevention, the Commission agreed that the preparation of lists of common features present in typical fraudulent schemes could be useful as educational material for participants in international trade and other potential targets of perpetrators of fraud to the extent such lists would help potential targets protect themselves and avoid becoming victims of fraudulent schemes. While it was not proposed that the Commission itself or its intergovernmental working groups should be directly involved in that activity, it was agreed that the Secretariat should consider preparing, in close consultation with experts, such materials listing common features present in typical fraudulent schemes and that the Secretariat would keep the Commission informed of progress in that regard.[26]

213. At its thirty-eighth session, in 2005, the Commission's attention was drawn to resolution 2004/26 adopted by the Economic and Social Council on 21 July 2004,

entitled "International cooperation in the prevention, investigation, prosecution and punishment of fraud, the criminal misuse and falsification of identity and related crimes".[27] At that session, the Commission was advised that, pursuant to that resolution, the United Nations Office on Drugs and Crime had convened an intergovernmental expert group meeting from 17 to 18 March 2005 to prepare a study on fraud and, the criminal misuse and falsification of identity, and to develop on the basis of such a study relevant practices, guidelines or other materials, taking into account in particular the relevant work of UNCITRAL. The Commission noted that the results of that meeting were reported to the Commission on Crime Prevention and Criminal Justice at its fourteenth session (Vienna, 23-27 May 2005; see E/CN.15/2005/11), and that participants at that meeting had agreed that a study of the problem should be undertaken, based on information received in response to a questionnaire on fraud and the criminal misuse and falsification of identity. The Commission was also informed that the UNCITRAL secretariat had participated in the expert group meeting and the Commission expressed its support for the assistance of the UNCITRAL secretariat in the project of the United Nations Office on Drugs and Crime.[28]

214. At its thirty-ninth session, the Commission heard a progress report of work by the Secretariat on materials listing common features present in typical fraudulent schemes, which had the following main purposes: (a) the formulation of materials that would identify patterns and characteristics of commercial fraud in a manner that would encourage the private sector to mobilize its resources to combat commercial fraud in an organized and systematic manner; (b) to assist governmental bodies in understanding how they might help the public and private sectors to address the problem of commercial fraud; and (c) to assist the criminal law sector in understanding how best to engage the private sector in the battle against commercial fraud. The Commission took note of the suggested format for the preparation of common features of fraudulent schemes as set out in document A/CN.9/600, paragraph 14, and that the materials to be prepared could contain other items, such as a glossary of commonly used terms or explanations of how to effectively perform due diligence (A/CN.9/600, para. 16).

215. The Commission also heard that the United Nations Office on Drugs and Crime had reported on the progress of work on the study on fraud, the criminal misuse and falsification of identity and related crimes to the Commission on Crime Prevention and Criminal Justice at its fifteenth session (Vienna, 24-28 April 2006; see E/CN.15/2006/11 and Corr.1), and that it was anticipated that the study would be submitted to that Commission at its sixteenth session, in 2007. The UNCITRAL secretariat had worked with the secretariat of the Office in the drafting and dissemination of the questionnaire in preparation for that study.

216. Statements were made that commercial fraud deterred legitimate trade and undermined confidence in established contract practices and instruments. Against that background, it was said that the UNCITRAL transactional and private-law perspective and expertise were necessary for the full understanding of the problem of commercial fraud and were most useful in the formulation of measures to fight it. Appreciation was expressed for the work by the UNCITRAL secretariat in that area as well as for its cooperation with the United Nations Office on Drugs and Crime. Statements were made that particular attention should be paid to the increased use

by fraudsters of the Internet and to the use of business transactions for money-laundering.

217. The Commission agreed with those statements and concluded that its secretariat should continue its work in conjunction with experts and other interested organizations with respect to identifying common features of fraudulent schemes, with a view to presenting interim or final materials for the consideration of the Commission at a future session, and that it should continue to cooperate with the United Nations Office on Drugs and Crime in its study on fraud, the criminal misuse and falsification of identity and related crimes, and that it should keep the Commission informed of the progress of that work.

## X. Monitoring implementation of the New York Convention

218. The Commission recalled that, at its twenty-eighth session, in 1995, it had approved a project, undertaken jointly with Committee D (now known as the Arbitration Committee) of the International Bar Association, aimed at monitoring the legislative implementation of the New York Convention.[29] It was also recalled that the Secretariat had presented an interim report to the Commission at its thirty-eighth session, in 2005 (A/CN.9/585), which set out the issues raised by the replies received in response to the questionnaire circulated in connection with the project.[30]

219. It was further recalled that, at that session, the Commission welcomed the progress reflected in the interim report, noting that the general outline of replies received served to facilitate discussions as to the next steps to be taken and highlighted areas of uncertainty where more information could be sought from States parties or further studies could be undertaken. It was suggested that one possible future step could be the development of a legislative guide to limit the risk that State practice would diverge from the spirit of the New York Convention.[31]

220. At its thirty-ninth session, the Commission took note of an oral presentation by the Secretariat on additional questions it proposed to put to States (as noted in document A/CN.9/585, para. 73) in order to obtain more comprehensive information regarding various aspects of implementation of the New York Convention, including legislation, case law and practice. The Commission agreed that the project should aim at the development of a legislative guide, with a view to promoting a uniform interpretation of the New York Convention. After discussion, the Commission reaffirmed the decisions made at its thirty-eighth session, in 2005, that a level of flexibility should be left to the Secretariat in determining the time frame for completion of the project and the level of detail that should be reflected in the report that the Secretariat would present for consideration by the Commission in due course.[32]

# XI. Technical assistance to law reform

## A. Technical assistance activities

221. The Commission had before it a note by the Secretariat (A/CN.9/599) describing the technical assistance activities undertaken subsequent to the date of the note on technical assistance submitted to the Commission at its thirty-eighth session, in 2005 (A/CN.9/586). The Commission emphasized the importance of such technical cooperation and expressed its appreciation for the activities undertaken by the Secretariat referred to in document A/CN.9/599, paragraphs 8-14.

222. The Commission noted that the continuing ability to provide technical assistance in response to specific requests of States was dependent upon the availability of funds to meet associated UNCITRAL costs and reiterated its appeal to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL Trust Fund for Symposia, if possible in the form of multi-year contributions, or as specific-purpose contributions, so as to facilitate planning and enable the Secretariat to meet the increasing requests from developing countries and countries with economies in transition for training and technical legislative assistance. The Commission expressed its appreciation to those States that had contributed to the fund since the thirty-eighth session, namely Mexico and Singapore, and also to organizations that had contributed to the programme by providing funds or staff or by hosting seminars.

223. The Commission appealed to the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the trust fund established to provide travel assistance to developing countries that were members of the Commission, noting that no contributions to the trust fund for travel assistance had been received since the thirty-eighth session.

## B. Technical assistance resources

224. The Commission noted with appreciation the continuing work under the system established for the collection and dissemination of case law on UNCITRAL texts (CLOUT). As at 4 April 2006, 54 issues of CLOUT had been prepared for publication, dealing with 604 cases, relating mainly to the United Nations Sales Convention and the Arbitration Model Law.

225. It was widely agreed that CLOUT continued to be an important aspect of the overall technical assistance activities undertaken by UNCITRAL and that the broad dissemination of CLOUT, in all six official languages of the United Nations, promoted the uniform interpretation and application of UNCITRAL texts. The Commission expressed its appreciation to the national correspondents for their work in selecting decisions and preparing case abstracts.

226. The Commission noted that the digest of case law on the United Nations Sales Convention, published in December 2004, was being reviewed and edited and that the first draft of a digest of case law relating to the Arbitration Model Law was being finalized for publication.

227. The Commission also noted developments with respect to the UNCITRAL website (www.uncitral.org), emphasizing its importance as a component of the overall programme of information and technical assistance activities, expressing its appreciation for its availability in the six official languages of the United Nations and encouraging the Secretariat to further maintain and upgrade it in accordance with existing guidelines.

228. The Commission took note of developments with respect to the UNCITRAL Law Library and UNCITRAL publications. With respect to the UNCITRAL Yearbook, the Commission encouraged the Secretariat to take steps to reduce the costs and time delays associated with its publication, noting the importance of the Yearbook as a means of disseminating information on the work of UNCITRAL.

### C. Future activities

229. The Commission noted that permanent missions to the United Nations located in Vienna had been briefed on the objectives and planning of UNCITRAL's technical assistance activities and that the Secretariat was taking further steps to strengthen links with those permanent missions to facilitate identification of national and regional needs for technical assistance.

## XII. Status and promotion of UNCITRAL legal texts

230. The Commission considered the status of the conventions and model laws emanating from its work, as well as the status of the New York Convention, on the basis of a note by the Secretariat (A/CN.9/601), as updated by information available on the UNCITRAL website. The Commission noted with appreciation the new actions and enactments of States and jurisdictions since its thirty-eighth session regarding the following instruments:

(a) [Unamended] Convention on the Limitation Period in the International Sale of Goods (New York, 1974).[33] New action by Liberia; number of States parties: 26;

(b) Convention on the Limitation Period in the International Sale of Goods, as amended (New York, 1980).[34] New action by Liberia; number of States parties: 19;

(c) United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978).[35] New actions by Liberia and Paraguay; number of States parties: 31;

(d) United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). New actions by Liberia and Paraguay; number of States parties: 67;

(e) United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988).[36] New action by Liberia; number of States parties: five;

(f) United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991).[37] New action by Paraguay; number of States parties: four;

(g) United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995).[38] New action by Liberia; number of States parties: eight;

(h) United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001).[39] New action by Liberia; number of States parties: one;

(i) United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005). New actions by the Central African Republic, Lebanon and Senegal;[40]

(j) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). New actions by Liberia and Pakistan; number of States parties: 137;

(k) UNCITRAL Model Law on International Commercial Arbitration (1985). New jurisdictions that had enacted legislation based on the Model Law: Austria, Denmark, Nicaragua, Norway, Poland, Turkey and, within the United States of America, the state of Louisiana;

(l) UNCITRAL Model Law on Electronic Commerce (1996). New jurisdictions that had enacted legislation based on the Model Law: China, within Canada, the state of Alberta, Sri Lanka and, within the United States, the states of Alaska and South Carolina;

(m) UNCITRAL Model Law on Cross-Border Insolvency (1997). New jurisdictions that had enacted legislation based on the Model Law: Serbia, United Kingdom of Great Britain and Northern Ireland and the British Virgin Islands (overseas territory of the United Kingdom);

(n) UNCITRAL Model Law on Electronic Signatures (2001). New jurisdictions that had enacted legislation based on the Model Law: China;

(o) UNCITRAL Model Law on International Commercial Conciliation (2002).[41] New jurisdictions that had enacted legislation based on the Model Law: Canada, Croatia, Hungary and Nicaragua; uniform state legislation based on the Model Law had been prepared in the United States and enacted, within the United States, by the states of Illinois, Iowa, Nebraska, New Jersey, Ohio and Washington.

231. The Commission noted the finalization by the Secretariat of the explanatory note relating to the Convention on Electronic Contracts (A/CN.9/608 and Add.1-4). The Commission expressed its appreciation for that explanatory note and requested the Secretariat to publish and widely circulate it, possibly as a sales publication.

# XIII. Coordination and cooperation

## A. General

232. At its thirty-ninth session, the Commission had before it a note by the Secretariat (A/CN.9/598) providing a brief survey of the work of international organizations related to the harmonization of international trade law, focusing upon

substantive legislative work, as well as two additional notes addressing specific areas of activity, procurement (A/CN.9/598/Add.1) and security interests (A/CN.9/598/Add.2) (for an account of the discussion, see para. 192 above and paras. 235-251 below). The Commission commended the Secretariat for the preparation of those reports, recognizing their value to coordination of the activities of international organizations in the field of international trade law, and welcomed the revision of the survey on an annual basis.

233. It was recalled that the Commission had generally agreed at its thirty-seventh session, in 2004, that it should adopt a more proactive attitude, through its secretariat, to fulfilling its coordination role.[42] Recalling the endorsement by the General Assembly, most recently in its resolution 60/20 of 23 November 2005, paragraph 4, of UNCITRAL efforts and initiatives towards coordination of activities of international organizations in the field of international trade law (see para. 260 below), the Commission noted with appreciation that the secretariat was taking steps to engage in a dialogue, on both legislative and technical assistance activities, with a number of organizations, including the Common Market for Eastern and Southern Africa, the Hague Conference on Private International Law, the International Council for Commercial Arbitration, the International Institute for the Unification of Private Law (Unidroit), the International Law Institute, the International Monetary Fund, the Organization of American States (OAS), and the World Bank. The Commission noted that that work often involved travel to meetings of those organizations and the expenditure of funds allocated for official travel. The Commission reiterated the importance of coordination work being undertaken by UNCITRAL as the core legal body in the United Nations system in the field of international trade law and supported the use of travel funds for that purpose.

234. In response to a request from Unidroit, the Secretariat proposed that the current edition of the Unidroit Principles of International Commercial Contracts[43] might be circulated to States with a view to possible endorsement by the Commission at its fortieth session, in 2007. After discussion, the Commission agreed to that proposal, noting that the circulation would facilitate coordination between the two organizations and would be of assistance to States that were not members of Unidroit and to other users in using the Unidroit Principles in their legislative and other work.

## B. Coordination and cooperation in the field of secured financing law

235. The Commission had before it a note by the Secretariat on current activities of international organizations related to the harmonization and unification of security interests law (A/CN.9/598/Add.2).

### 1. Draft Unidroit convention on substantive rules regarding intermediated securities

236. The Commission noted with appreciation the cooperation between the secretariat of Unidroit and the UNCITRAL secretariat with a view to ensuring consistency between the draft Unidroit convention on substantive rules regarding intermediated securities (the "draft Unidroit securities convention") and the draft

UNCITRAL legislative guide on secured transactions (see chap. III above). Noting its earlier decision to generally exclude the taking of security rights in investment securities, the Commission discussed certain exceptions that could be considered by its Working Group VI (Security Interests). It was stated that the proposal contained in paragraph 11 of document A/CN.9/598/Add.2 needed to be formulated more narrowly so as to be limited to the exceptions to be approved by the Commission.

237. In particular, it was noted that a security right in securities, as original encumbered assets or as proceeds, created and made effective against third parties under the draft Unidroit securities convention, would have priority over a competing security right in the securities as proceeds of an asset falling within the scope of legislation based on the draft UNCITRAL legislative guide on secured transactions. Similarly, it was noted that a security right in a receivable or other asset within the scope of the draft UNCITRAL legislative guide as an original encumbered asset should have priority over a competing security right in such a receivable or other asset as proceeds of securities. It was also noted that a security right in securities securing a receivable, negotiable instrument or other obligation would follow the receivable that it secured, provided that third-party rights, priority and enforcement were not affected.

238. It was widely felt that the points mentioned above formed an acceptable basis for discussion between the two secretariats and experts from the relevant Unidroit and UNCITRAL working groups with a view to reaching agreement on the coverage of cross-over issues in the two texts and on a qualified exclusion of securities from the scope of the draft UNCITRAL legislative guide on secured transactions. It was stated that one of the advantages of such an approach might be the avoidance of excluding from the draft UNCITRAL legislative guide matters not addressed in the draft Unidroit securities convention, such as security rights in directly held securities. It was stated that, for practical reasons, security rights in bank accounts and security rights in securities accounts should be treated as far as possible in the same manner and with the same result.

### 2. Draft Unidroit model law on leasing

239. The Commission noted that Unidroit was preparing a draft model law on leasing (the "draft Unidroit model law") that would cover both operating and financial leases (i.e. leases serving security purposes), which were addressed in the draft UNCITRAL legislative guide on secured transactions as acquisition financing devices. In addition, it was noted that discussions between the two secretariats showed some preference for ensuring that the draft Unidroit model law would defer to secured transactions law with respect to financial leases and be coordinated with the draft UNCITRAL legislative guide to avoid creating obstacles to legislation based on the draft UNCITRAL legislative guide. In addition, it was stated that the draft Unidroit model law would be of particular benefit to countries in the African region in view of the need for infrastructure improvements.

240. Broad support was expressed for the coordination of efforts by Unidroit and the Commission with a view to ensuring harmony between the draft Unidroit model law and the draft UNCITRAL legislative guide on secured transactions. It was widely felt that the cooperation of the two secretariats was a useful step in the right direction in identifying a common approach to be proposed to States.

241. After discussion, the Commission requested the Secretariat to continue its efforts of coordination with Unidroit with a view to ensuring harmony between the draft Unidroit model law and the draft UNCITRAL legislative guide on secured transactions.

### 3. European Bank for Reconstruction and Development Guiding Principles for the Development of a Charges Registry

242. The Commission noted with interest the publication by the European Bank for Reconstruction and Development of a set of principles dealing with security rights registries. It was stated that the Commission should also prepare such a set of principles, taking into account the European Bank Principles, as well as other similar sets of principles.

### 4. European Commission proposal for a regulation on the law applicable to contractual obligations (Rome I)

243. With respect to the relationship between the European Commission's proposal for a regulation on the law applicable to contractual obligations (the "proposed Rome I Regulation") and the United Nations Convention on the Assignment of Receivables in International Trade (the "United Nations Assignment Convention"), the Commission noted with appreciation that the European Commission shared the concerns expressed in the note by the Secretariat (see A/CN.9/598/Add.2, para. 34) and admitted that the adoption in a European Union binding instrument of an approach to the law applicable to third-party effects of assignments that would be different from the approach taken in the United Nations Assignment Convention would undermine the certainty reached at the international level and might have a negative impact on the availability and the cost of credit. In addition, the Commission noted with appreciation that the European Commission had expressed its willingness to cooperate closely with the UNCITRAL secretariat to ensure, as far as possible, coherence between the two instruments and the facilitation of ratification of the United Nations Assignment Convention by European Union member States.

244. Strong support was expressed in the Commission for close cooperation with the European Commission with a view to ensuring consistency between the two texts and enabling ratification of the United Nations Assignment Convention by European Union member States. It was widely felt that an internationally uniform rule on the law applicable to third-party effects of assignment would enhance certainty of law with regard to important financial transactions and promote the availability of lower-cost credit throughout the world.

245. It was stated that, for the proposed Rome I Regulation to be consistent with the United Nations Assignment Convention, a number of issues might be usefully clarified, including that the branch rule in article 18, paragraph 1, of the proposed Rome I Regulation would not apply to the situations covered in article 13, paragraph 3, of the proposed Rome I Regulation.

246. In that connection, a concern was expressed that, while it was appropriate for the Secretariat to express comments, it was not for the Commission to make suggestions with respect to a draft regulation of the European Union at such an early stage in the process. In response, it was stated that, far from wishing to interfere

with the legislative process of the European Union, the Commission had a legitimate interest not only to ensure wide ratification of a text that emanated from its work but mainly to avoid a situation where, because of inconsistencies between the two texts, lack of harmony and lack of certainty with respect to the law applicable to important financing transactions, the whole work of the Commission in that area would be undermined, a result that could disrupt international financial markets and have a negative impact on the availability and the cost of credit. It was also observed that, in the context of work by the Commission, many States had accepted to change their laws in order to benefit from the harmonization and unification of international trade law. In addition, it was said that the timing of the consideration of the matter by the Commission was most appropriate as the proposed regulation was still in draft form and any comments could still be taken into account. For the reasons mentioned above, coordination was generally considered appropriate and useful.

247. The delegations of Canada and the United States stated that they were jointly taking steps to implement and ratify the United Nations Assignment Convention. In that context, it was stated that those States were examining the differences between the United Nations Assignment Convention and their laws, as well as the changes that they needed to make in their laws (in particular with respect to the definition of "location") to benefit from the uniform law rules of the United Nations Assignment Convention. It was also observed that, in the spirit of coordination, those States looked forward to discussing those issues with other States.

248. The Commission requested the Secretariat to continue cooperating closely with the European Commission to ensure consistency between the proposed Rome I Regulation and the United Nations Assignment Convention.

### 5. Organization of American States project on security rights registries

249. The Commission noted with interest a new project of OAS with respect to the preparation of rules and regulations for the registration of notices in security rights registries, which could be applied to national, subregional or regional registries that might be utilized by more than one State. It was stated that interested experts, upon invitation by the OAS secretariat, could participate in an Internet-based forum discussing these matters. The Commission requested the Secretariat to follow the OAS project and report to the Commission in due course.

### 6. World Intellectual Property Organization work on intellectual property financing

250. Recalling its discussion about future work in the field of intellectual property financing (see paras. 81-84 and 86 above), the Commission took note with appreciation of the cooperation between the WIPO secretariat and the UNCITRAL secretariat with respect to intellectual property financing.

### 7. World Bank manual on secured financing

251. The Commission noted plans by the Investment Climate Unit of the World Bank to prepare a manual on secured transactions and requested the Secretariat to monitor developments and report to the Commission in due course with a view to avoiding duplication of efforts, overlap and conflicts between that text and the draft

UNCITRAL legislative guide on secured transactions being prepared by the Commission.

## C. Reports of other international organizations

### 1. International Institute for the Unification of Private Law (Unidroit)

252. The Commission heard a statement on behalf of Unidroit, reporting on progress with a number of projects, including the following:

(a) The Protocol to the Cape Town Convention on Matters Specific to Aircraft Equipment (Cape Town, 2001)[44] had entered into force on 1 March 2006 and the registry function under that Convention was operable and being supervised by the International Civil Aviation Organization;

(b) Adoption of the second protocol to the Cape Town Convention, dealing with the financing of railway rolling stock, was expected in early 2007; negotiation of a third protocol, dealing with space assets was continuing; and work on a possible fourth protocol dealing with agricultural, construction and mining equipment was under way;

(c) A third version of the Unidroit Principles of International Commercial Contracts was under consideration, with completion and adoption expected in 2010;

(d) A further meeting of experts on the draft convention on substantive rules regarding intermediated securities (see para. 236 above) was to be held in 2006, with possible adoption or, depending on progress, a further round of consultations, in 2007;

(e) A uniform contract law prepared for States parties to the Treaty on the Harmonization of Business Law in Africa[45] was ready for adoption;

(f) Adoption of a model law on leasing was also foreshadowed (see para. 239 above).

253. The Commission heard that Lithuania had become the sixty-first member of Unidroit.

### 2. United Nations Convention on Contracts for the International Sale of Goods Advisory Council

254. The Commission heard a presentation from the CISG Advisory Council, a private international initiative aimed at promoting uniform interpretation of the United Nations Sales Convention pursuant to article 7 of the Convention. The Commission heard that advisory opinions of the Council on the Convention were given either on request or at the initiative of the Council itself, with five advisory opinions already having been issued and several more being prepared.

### 3. Banque des Etats de l'Afrique Centrale

255. The Commission was informed that the Banque des Etats de l'Afrique Centrale was a subregional central bank under the jurisdiction of the Economic and Monetary Community of Central Africa (CEMAC), which included six member States. It was noted that the CEMAC member States were also members of the

Organization for the Harmonization of Business Law in Africa (OHADA). The Commission noted that CEMAC and OHADA were undertaking modernization of trade laws, in particular in the areas of insolvency, securities and means of payment and, like other regional legal integration institutions, had a mandate to cooperate with UNCITRAL.

## XIV. Congress 2007

256. The Commission recalled that, at its thirty-eighth session, in 2005, it had approved a plan, in the context of the fortieth annual session of the Commission in Vienna, in 2007, to hold a congress similar to the UNCITRAL Congress on Uniform Commercial Law in the Twenty-first Century (New York, 18-22 May 1992).[46] The Commission had envisaged that the congress would review the results of the past work programme of UNCITRAL, as well as related work of other organizations active in the field of international trade law, assess current work programmes and consider and evaluate topics for future work programmes.[47]

257. At its thirty-ninth session, the Commission had before it a proposal by the Secretariat regarding a suggested programme outline for the congress, contained in a conference room paper A/CN.9/XXXIX/CRP.2. It was understood that the congress would not formulate conclusions or collective recommendations but rather that the Commission would be able to draw inspiration from views expressed at the congress as it deemed appropriate. The Commission welcomed the proposals by the Secretariat and heard expressions of support for the overall concept of the congress. However, concerns were also expressed about the proposed duration of the congress (five days), in particular in view of the overall duration of the Commission's fortieth session (see para. 272 below). Concerns were also expressed that some of the topics outlined for the congress (e.g., corporate governance; foreign investment; methods and institutional arrangements for commercial law reform; and the role of the judiciary in ensuring a stable framework for commercial transactions: predictability of law and legal interpretation) were not directly related to the current work programme of the Commission. The Secretariat was encouraged to consider limiting the number of topics proposed to be covered and to focus on matters directly related to the Commission's line of work. The Commission also encouraged Member States to transmit their views on the proposed programme to the Secretariat, with a view to the finalization of the programme before the end of 2006.

258. The Commission, after having discussed the duration of the congress also in connection with the overall duration of the Commission session, adopted the view that every effort should be made to shorten the duration of the formal deliberations on the agenda at its next session to a maximum of two weeks and that the congress, which should commence after the completion of the formal deliberations in the Commission, should not exceed four days. (For the dates of the Commission's session, including the congress, see para. 272 below).

## XV. Relevant General Assembly resolutions

259. The Commission took note with appreciation of General Assembly resolutions 60/20, on the report of the Commission on the work of its thirty-eighth

session, and 60/21, on the United Nations Convention on the Use of Electronic Communications in International Contracts, both of 23 November 2005.

260. Particular note was taken of paragraph 4 of General Assembly resolution 60/20, by which the Assembly endorsed the efforts and initiatives of the Commission aimed at increasing coordination of and cooperation on legal activities of international and regional organizations active in the field of international trade law and appealed to those organizations to coordinate their legal activities with those of the Commission.

261. With reference to paragraphs 5 and 6 of resolution 60/20, the Commission appreciated the General Assembly's calls for support by all concerned to the Commission's technical assistance programme and for contributions to the UNCITRAL Trust Fund for Symposia (from which legislative technical assistance was financed) and to the trust fund established to provide travel assistance to developing countries that were members of the Commission to attend the sessions of the Commission and its working groups.

# XVI. Other business

## A. Willem C. Vis International Commercial Arbitration Moot

262. It was noted that the Institute of International Commercial Law at Pace University School of Law in White Plains, New York, had organized the Thirteenth Willem C. Vis International Commercial Arbitration Moot in Vienna, from 7 to 13 April 2006. As in previous years, the Moot had been co-sponsored by the Commission. It was noted that legal issues dealt with by the teams of students participating in the Thirteenth Moot had been based on the United Nations Sales Convention, the Arbitration Rules of the Chicago International Dispute Resolution Association,[48] the Arbitration Model Law and the New York Convention. A total of 156 teams from law schools in 49 countries had participated in the Thirteenth Moot. The best team in oral arguments was that of Queen Mary, University of London, followed by Stetson University, Florida, United States. The Fourteenth Willem C. Vis International Commercial Arbitration Moot would be held in Vienna, from 30 March to 5 April 2007.

263. The Commission heard a report about the history, growth and features of the Moot. Statements were made highlighting the importance of the Moot as a means of introducing law students to the work of UNCITRAL and to its uniform legal texts, in particular in the areas of contract law and arbitration. The Commission noted the positive impact that the Moot had on law students, professors and practitioners around the world. It was widely felt that the annual Moot, with its extensive oral and written competition and its broad international participation, presented an excellent opportunity to disseminate information about UNCITRAL and its legal texts and for teaching international trade law. A suggestion was made that information about the Moot should be more broadly circulated in law schools and universities and that the Moot should be considered as an important part of the UNCITRAL technical assistance programme.

264. The Commission expressed its gratitude to the organizers and sponsors of the Moot, including Pace University, the Austrian Federal Economic Chamber and the

Law Faculty of the University of Vienna, for their efforts to make the Moot successful. It was hoped that the international outreach and positive impact of the Moot would continue growing. Special appreciation was expressed to Eric E. Bergsten, former Secretary of the Commission, for the development and direction of the Moot since its inception in 1993-1994.

### B. Special event, including the ceremony of the signing of the United Nations Convention on the Use of Electronic Communications in International Contracts

265. The Commission heard a report on the special event that took place on 6 July 2006 at United Nations Headquarters, in New York, which included the ceremony of the signing of the Convention on Electronic Contracts. The Secretariat had organized the event with a view to promoting participation in the Convention and to disseminating information about its provisions.

266. The Commission expressed its appreciation to the Governments of China, Singapore and Sri Lanka for having signed the Convention, and to the Governments of Colombia, Iran (Islamic Republic of), Mexico, Paraguay, Russian Federation, Spain and the United States for the expressions of strong support for the Convention made during the special event.

### C. Internship

267. An oral report was presented on the internship programme in the Commission's secretariat. While general appreciation was expressed for the programme, it was observed that only a small proportion of interns originated from developing countries. A suggestion was made that consideration should be given to establishing the financial means of supporting wider participation by young lawyers from developing countries, possibly by way of a trust fund, which could be established by the General Assembly.

### D. Bibliography

268. The Commission noted with appreciation the bibliography of recent writings related to its work (A/CN.9/602). The Commission was informed that the bibliography was being updated on the UNCITRAL website on an ongoing basis. The Commission stressed that it was important for the bibliography to be as complete as possible and, for that reason, requested Governments, academic institutions, other relevant organizations and individual authors to send copies of relevant publications to the UNCITRAL secretariat.

## XVII. Date and place of future meetings

### A. General discussion on the duration of sessions

269. At its thirty-sixth session, in 2003, the Commission agreed (a) that working groups should normally meet for a one-week session twice a year; (b) that extra

time, if required, could be allocated from the unused entitlement of another working group provided that such arrangement would not result in the increase of the total number of 12 weeks of conference services per year currently allotted to sessions of all six working groups of the Commission; and (c) that if any request by a working group for extra time would result in the increase of the 12-week allotment, it should be reviewed by the Commission, with proper justification being given by that working group regarding the reasons for which a change in the meeting pattern was needed.[49]

270. In view of the magnitude and complexities of the project before Working Group III (Transport Law), the Commission decided to authorize two week sessions of the Working Group to be held in the autumn of 2006 and the spring of 2007 (see para. 273 (c) below), utilizing the entitlement of Working Group IV (Electronic Commerce), which would not meet before the Commission's fortieth session (see para. 273 (d) below).

271. In the light of the new project in the area of insolvency law to be undertaken by Working Group V (Insolvency Law) (see para. 209 above), the Commission agreed that the Working Group would meet for its thirty-first and thirty-second sessions in the autumn of 2006 and in the spring of 2007 (see para. 273 (e) below). In addition, the Commission noted that tentative arrangements had been made for a session in the autumn of 2007 (see para. 274 (d) below), which could be used to accommodate the need for a session of either Working Group V (Insolvency Law) or of Working Group IV (Electronic Commerce), depending on the needs of the working groups and subject to the Commission's decision at its next session, in 2007. The Commission further noted that the resulted saving of one week of conference services in the autumn of 2007 would allow holding the twentieth session of Working Group III (Transport Law) for two weeks (see para. 274 (c) below).

## B. Fortieth session of the Commission

272. The Commission approved the holding of its fortieth session in Vienna, from 25 June to 12 July 2007. It was agreed that the congress (see paras. 256-258 above) would be held during the last week of the session, from 9 to 12 July 2007.

## C. Sessions of working groups up to the fortieth session of the Commission

273. The Commission approved the following schedule of meetings for its working groups:

(a) Working Group I (Procurement) would hold its tenth session in Vienna from 25 to 29 September 2006 and its eleventh session in New York from 21 to 25 May 2007;

(b) Working Group II (Arbitration and Conciliation) would hold its forty-fifth session in Vienna from 11 to 15 September 2006 and its forty-sixth session in New York from 5 to 9 February 2007;

(c) Working Group III (Transport Law) would hold its eighteenth session in Vienna from 6 to 17 November 2006 and its nineteenth session in New York from 16 to 27 April 2007;

(d) No session of Working Group IV (Electronic Commerce) was envisaged;

(e) Working Group V (Insolvency Law) would hold its thirty-first session in Vienna from 11 to 15 December 2006 and its thirty-second session in New York from 14 to 18 May 2007;

(f) Working Group VI (Security Interests) would hold its eleventh session in Vienna from 4 to 8 December 2006 and its twelfth session in New York from 12 to 16 February 2007.

## D. Sessions of working groups in 2007 after the fortieth session of the Commission

274. The Commission noted that tentative arrangements had been made for working group meetings in 2007 after its fortieth session (the arrangements were subject to the approval of the Commission at its fortieth session):

(a) Working Group I (Procurement) would hold its twelfth session in Vienna from 3 to 7 September 2007;

(b) Working Group II (Arbitration and Conciliation) would hold its forty-seventh session in Vienna from 10 to 14 September 2007;

(c) Working Group III (Transport Law) would hold its twentieth session in Vienna from 15 to 25 October 2007 (the United Nations offices in Vienna would be closed on 26 October);

(d) Tentative arrangements had been made for a session to be held in Vienna from 5 to 9 November 2007, which could be used for the forty-fifth session of Working Group IV (Electronic Commerce) or for the thirty-third session of Working Group V (Insolvency Law) (see para. 271 above);

(e) Working Group VI (Security Interests) would hold its thirteenth session in Vienna from 24 to 28 September 2007.

*Notes*

[1] Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 17 were elected by the Assembly at its fifty-fifth session, on 16 October 2000 (decision 55/308), and 43 were elected by the Assembly at its fifty-eighth session, on 17 November 2003 (decision 58/407). By its resolution 31/99, the Assembly altered the dates of commencement and termination of membership by deciding that members would take office at the beginning of the first day of the regular annual session of the Commission immediately following their election and that their terms of office would expire on the last day prior to the opening of the seventh regular annual session following their election.

[2] General Assembly resolution 60/21, annex.

[3] United Nations publication, Sales No. E.05.V.10.

[4] United Nations, *Treaty Series*, vol. 330, No. 4739.

[5] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I, and United Nations publication, Sales No. E.95.V.18.

[6] Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), annex I, and United Nations publication, Sales No. E.99.V.4, which contains also the accompanying Guide to Enactment.

[7] United Nations, *Treaty Series*, vol. 1489, No. 25567, and United Nations publication, Sales No. E.95.V.12.

[8] General Assembly resolution 2205 (XXI), section II, paragraph 8 (d).

[9] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17).

[10] Ibid., *Thirty-first Session, Supplement No. 17* (A/31/17), para. 57.

[11] Ibid., *Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I, and United Nations publication, Sales No. E.98.V.13, which contains also the accompanying Guide to Enactment.

[12] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 225-230 and ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 79-82.

[13] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 81-82.

[14] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 171.

[15] Ibid.

[16] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 345.

[17] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 224.

[18] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 208; ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 133; and ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 238.

[19] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 213-215.

[20] Ibid., para. 213.

[21] Ibid., para. 214.

[22] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), annex II, and United Nations publication, Sales No. E.02.V.8, which contains also the accompanying Guide to Enactment.

[23] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 209 and 210.

[24] Ibid., *Fifty-second Session, Supplement No. 17* (A/52/17), annex I, and United Nations publication, Sales No. E.99.V.3, which contains also the accompanying Guide to Enactment.

[25] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 279-290; *Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 231-241; *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 108-112; and *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 216-220.

[26] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 110-112.

[27] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 217.

[28] Ibid., paras. 218 and 219.

[29] Ibid., *Fiftieth Session, Supplement No. 17* (A/50/17), paras. 401-404.

[30] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 189.

[31] Ibid., paras. 190-191.

[32] Ibid., para. 191.

[33] United Nations, *Treaty Series*, vol. 1511, No. 26119.

[34] Ibid., No. 26121, and United Nations publication, Sales No. E.95.V.13.

[35] Ibid., vol. 1695, No. 29215, and United Nations publication (Sales No. E.95.V.14).

[36] General Assembly resolution 43/165, annex, and United Nations publication, Sales No. E.95.V.16.

[37] *Official Records of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade, Vienna, 2-19 April 1991* (United Nations publication, Sales No. E.93.XI.3), part I, document A/CONF.152/13, annex.

[38] United Nations, *Treaty Series*, vol. 2169, No. 38030, and United Nations publication (Sales No. E.97.V.12).

[39] General Assembly resolution 56/81, annex, and United Nations publication, Sales No. E.04.V.14.

[40] General Assembly resolution 60/21, annex. For actions by China, Singapore and Sri Lanka during the special event on 6 July 2006, held in conjunction with the thirty-ninth session of the Commission, which included the ceremony of the signing of the Convention on Electronic Contracts, see paragraph 266 of the present report.

[41] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (A/57/17), annex I, and United Nations publication, Sales No. E.05.V.4.

[42] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 113-115.

[43] Available as at the date of the preparation of the present report at http://www.unidroit.org/english/principles/contracts/main.htm.

[44] Available as at the date of the preparation of the present report at http://www.unidroit.org/english/conventions/mobile-equipment/main.htm.

[45] Available as at the date of the preparation of the present report at http://www.ohada.com/traite.php?categorie=10.

[46] For the proceedings of the Congress, see *Uniform Commercial Law in the Twenty-first Century: Proceedings of the Congress of the United Nations Commission on International Trade Law, New York, 18-22 May 1992*, United Nations publication, Sales No. E.94.V.14 (A/CN.9/SER.D/1).

[47] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 231.

[48] Available as at the date of the preparation of the present report at http://www.cidra.org/rules.htm.

[49] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 275.

# Annex I

## Revised articles of the UNCITRAL Model Law on International Commercial Arbitration

**[Article 1, paragraph 2]**

2. The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

**Article 2 A. International origin and general principles**

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

**[Article 7]**

*Option I*

**Article 7. Definition and form of arbitration agreement**

1. "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

2. The arbitration agreement shall be in writing.

3. An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

4. The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

5. Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

6. The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

*Option II*

**Article 7. Definition of arbitration agreement**

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

## Chapter IV A. Interim measures and preliminary orders

### Section 1. Interim measures

**Article 17. Power of arbitral tribunal to order interim measures**

1. Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

**Article 17 A. Conditions for granting interim measures**

1. The party requesting an interim measure under article 17, paragraph 2 (a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

2. With regard to a request for an interim measure under article 17, paragraph 2 (d), the requirements in paragraph 1 (a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

**Section 2. Preliminary orders**

**Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders**

1. Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

2. The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

3. The conditions defined under article 17 A apply to any preliminary order, provided that the harm to be assessed under article 17 A, paragraph 1 (a), is the harm likely to result from the order being granted or not.

**Article 17 C. Specific regime for preliminary orders**

1. Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

2. At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

3. The arbitral tribunal shall decide promptly on any objection to the preliminary order.

4. A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

5. A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

**Section 3. Provisions applicable to interim measures and preliminary orders**

**Article 17 D. Modification, suspension, termination**

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

**Article 17 E. Provision of security**

1. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

2. The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

**Article 17 F. Disclosure**

1. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

2. The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph 1 of this article shall apply.

**Article 17 G. Costs and damages**

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

**Section 4. Recognition and enforcement of interim measures**

**Article 17 H. Recognition and enforcement**

1. An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

2. The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

3. The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

**Article 17 I. Grounds for refusing recognition or enforcement***

1. Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

* The conditions set forth in article 17 I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

(i) Such refusal is warranted on the grounds set forth in article 36, paragraph 1 (a)(i), (ii), (iii) or (iv); or

(ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in article 36, paragraph 1 (b)(i) or (ii), apply to the recognition and enforcement of the interim measure.

2. Any determination made by the court on any ground in paragraph 1 of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

**Section 5. Court-ordered interim measures**

**Article 17 J. Court-ordered interim measures**

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

**[Article 35, paragraph 2]**

2. The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.

## Annex II

# Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session

*The United Nations Commission on International Trade Law,*

*Recalling* General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

*Conscious* of the fact that the different legal, social and economic systems of the world, together with different levels of development, are represented in the Commission,

*Recalling* successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

*Convinced* that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958,[1] has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

*Recalling* that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference "considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes",

*Bearing in mind* differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

*Taking into account* article VII, paragraph 1, of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

*Considering* the wide use of electronic commerce,

[1] United Nations, *Treaty Series*, vol. 330, No. 4739.

*Taking into account* international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration,[2] as subsequently revised, particularly with respect to article 7,[3] the UNCITRAL Model Law on Electronic Commerce,[4] the UNCITRAL Model Law on Electronic Signatures[5] and the United Nations Convention on the Use of Electronic Communications in International Contracts,[6]

*Taking into account also* enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

*Considering that*, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

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[2] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I, and United Nations publication, Sales No. E.95.V.18.

[3] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), annex I.

[4] Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), annex I, and United Nations publication, Sales No. E.99.V.4, which contains also an additional article 5 bis, adopted in 1998, and the accompanying Guide to Enactment.

[5] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), annex II, and United Nations publication, Sales No. E.02.V.8, which contains also the accompanying Guide to Enactment.

[6] General Assembly resolution 60/21, annex.

## Annex III

### List of documents before the Commission at its thirty-ninth session

| *Symbol* | *Title or description* |
|---|---|
| A/CN.9/587 | Provisional agenda, annotations thereto and scheduling of meetings of the thirty-ninth session |
| A/CN.9/588 | Report of Working Group VI (Security Interests) on the work of its eighth session (Vienna, 5-9 September 2005) |
| A/CN.9/589 | Report of Working Group II (Arbitration and Conciliation) on the work of its forty-third session (Vienna, 3-7 October 2005) |
| A/CN.9/590 | Report of Working Group I (Procurement) on the work of its eighth session (Vienna, 7-11 November 2005) |
| A/CN.9/591 and Corr.1 | Report of Working Group III (Transport Law) on the work of its sixteenth session (Vienna, 28 November-9 December 2005) |
| A/CN.9/592 | Report of Working Group II (Arbitration and Conciliation) on the work of its forty-fourth session (New York, 23-27 January 2006) |
| A/CN.9/593 | Report of Working Group VI (Security Interests) on the work of its ninth session (New York, 30 January-3 February 2006) |
| A/CN.9/594 | Report of Working Group III (Transport Law) on the work of its seventeenth session (New York, 3-13 April 2006) |
| A/CN.9/595 | Report of Working Group I (Procurement) on the work of its ninth session (New York, 24-28 April 2006) |
| A/CN.9/596 | Note by the Secretariat on insolvency law: possible future work |
| A/CN.9/597 | Note by the Secretariat on developments in insolvency law: adoption and interpretation of the UNCITRAL Model Law on Cross-Border Insolvency and developments in interpretation of "centre of main interests" in the European Union |
| A/CN.9/598 | Note by the Secretariat on current activities of international organizations related to the harmonization and unification of international trade law |
| A/CN.9/598/Add.1 | Note by the Secretariat on legislative work of international organizations relating to pubic procurement |
| A/CN.9/598/Add.2 | Note by the Secretariat on current activities of international organizations related to the harmonization and unification of law relating to security interests |
| A/CN.9/599 | Note by the Secretariat on technical assistance |
| A/CN.9/600 | Note by the Secretariat on commercial fraud: ongoing and possible future work |
| A/CN.9/601 | Note by the Secretariat on the status of conventions and model laws |

| *Symbol* | *Title or description* |
|---|---|
| A/CN.9/602 | Bibliography of recent writings related to the work of UNCITRAL |
| A/CN.9/603 | Report of Working Group VI (Security Interests) on the work of its tenth session (New York, 1-5 May 2006) |
| A/CN.9/604 | Note by the Secretariat on possible future work in the area of electronic commerce |
| A/CN.9/605 | Note by the Secretariat on settlement of commercial disputes: interim measures |
| A/CN.9/606 | Note by the Secretariat on settlement of commercial disputes: form of arbitration agreement |
| A/CN.9/607 | Note by the Secretariat on settlement of commercial disputes: draft declaration regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention |
| A/CN.9/608 and Add.1-4 | Note by the Secretariat on legal aspects of electronic commerce: explanatory note on the Convention on the Use of Electronic Communications in International Contracts |
| A/CN.9/609 and Add.1-6 | Note by the Secretariat on draft legislative provisions on interim measures and the form of arbitration agreement: draft declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards—comments received from Member States and international organizations |
| A/CN.9/610 and Corr.1 | Note by the Secretariat on possible future work in the field of settlement of commercial disputes |
| A/CN.9/610/Add.1 | Note by the Secretariat on possible future work in the field of settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules |
| A/CN.9/611 | Note by the Secretariat on the draft legislative guide on secured transactions: security rights in receivables |
| A/CN.9/611/Add.1 | Note by the Secretariat on the draft legislative guide on secured transactions: security rights in rights to payment of funds credited to a bank account, proceeds under an independent undertaking, negotiable instruments and negotiable documents |
| A/CN.9/611/Add.2 | Note by the Secretariat on recommendations of the draft legislative guide on secured transactions |
| A/CN.9/611/Add.3 | Note by the Secretariat on the draft legislative guide on secured transactions |
| A/CN.9/612 | Note by the Secretariat on transport law: preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]—joint proposal by Australia and France on freedom of contract under volume contracts |